



Department  
of Health

# Regulations under the Health and Social Care Act 2012: Market entry by means of Pharmaceutical Needs Assessments

Information for NHS England  
Chapter 8 – unforeseen benefits

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## Chapter 8: Unforeseen benefits

1. This chapter deals with routine applications that have been submitted that will secure improvements or better access where these were not included in a local authority Health and Wellbeing (HWB's) pharmaceutical needs assessment (PNA), i.e. they offer to provide unforeseen benefits.

### Introduction

2. Although PNAs should be as comprehensive as possible, there may be occasions where a *routine application* is received that offers to provide improvements or better access to *pharmaceutical services* in general, or to specific *pharmaceutical services*, that were not identified within the PNA. This could be due to changes since the PNA was published, for example new and innovative types of service delivery, or service redesign that would be of benefit to patient groups.
3. If a *routine application* is submitted which offers to provide such unforeseen benefits, NHS England has regard to certain matters set out in **regulations 18** and **19**. However, before progressing any further there are a number of issues which NHS England must consider.

### Information to be included in all routine applications offering unforeseen benefits

4. **Part 1 of Schedule 2** sets out the information that is to be provided in the application to NHS England. Some of the requirements relate to all applications, whereas others are for specific types of application.
5. When submitting a *routine application* to provide unforeseen benefits, the following information must be included (**paragraph 1 of Schedule 2**):
  - the name of the relevant HWB for the area where the application is made;
  - the type of application being made, for example, an application offering unforeseen benefits;
  - a statement of whether the application is a *routine* or *excepted application*;

- the name and address of the applicant i.e. the name and address of the sole trader/partnership<sup>1</sup>/body corporate;
- if the applicant is a pharmacist sole trader, their General Pharmaceutical Council (GPhC) registration number. A pharmacist does not have to provide their GPhC registration number if their business is as a dispensing appliance contractor (DAC) and not a pharmacy contractor;
- if the applicant is a partnership, each partner's GPhC registration number<sup>2</sup>. A pharmacist does not have to provide their GPhC registration number if their partnership is as a DAC and not a pharmacy contractor;
- if the applicant is a body corporate for the purposes of the Medicines Act registration rules, the name and GPhC registration number of the superintendent pharmacist. If the applicant is a DAC, they are not required to have a superintendent pharmacist;
- where the application is for premises that are not already listed for the applicant for example additional premises and change of ownerships:
  - the address of the premises, where known, or if the address is not known the applicant's *best estimate* of where the proposed premises will be;
  - whether the applicant is currently in possession of the premises;
  - the proposed core opening hours for the premises; and
  - the total proposed opening hours for the premises (i.e. both *core opening* and *supplementary opening hours*);
- where the application includes the provision of *directed services*:
  - details of the *directed services* to be provided;
  - confirmation that the applicant is accredited to provide the services, where NHS England requires such accreditation;
  - confirmation that the premises are accredited in respect of the provision of the services, where NHS England requires such accreditation; and
  - where relevant a floor plan showing the consultation area where the applicant proposes to offer the *directed services*, unless one cannot be provided for reasons that NHS England accepts as good cause for example the premises are not in the applicant's possession.

6. The applicant must confirm whether the application is a routine or an excepted application (**paragraph 1(3) of Schedule 2**). They cannot switch between the two types of applications once the application has been made to NHS England (**paragraph 1(9) of Schedule 2**). Should the applicant wish to change the type of application, they are

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<sup>1</sup> If the applicant is a partnership then the address given in the application should be the one to which they wish all correspondence to be sent.

<sup>2</sup> The Medicines Act 1968 requires all partners to be pharmacists. Partners in limited liability partnerships should be dealt with as bodies corporate.

required to withdraw the first application and submit a second application, along with the relevant fee.

7. Where the applicant does not have an address for the proposed premises, **paragraph 1(7)(a)(ii) of Schedule 2** requires the applicant to give their *best estimate* of where the proposed premises will be. NHS England must be satisfied that:
  - it is the *best estimate* that the applicant can reasonably make at the time; and
  - any specific location within that *best estimate* would lead NHS England to come to the same decision on the application (**paragraph 1(10) of Schedule 2**).
8. It is particularly important that NHS England is clear where the proposed premises are likely to be in order that it can be satisfied that the application will provide unforeseen benefits. It is also important because, if approved, the applicant will be required to notify NHS England of the eventual address for the proposed premises (**paragraph 31 of Schedule 2** and NHS England must be satisfied at that point that the proposed premises are within the range of possible locations covered by the original *best estimate*. It will not at that later stage be able to re-evaluate whether the *best estimate* that it accepted was appropriate.
9. This second requirement ensures that if the application is approved, when the applicant submits the precise location of the premises to NHS England, there is nothing new in terms of the decision that NHS England has already taken i.e. if the applicant had listed those premises in their original application NHS England would have come to the same conclusion.
10. NHS England will also need to consider whether the *best estimate* allows them to establish whether the proposed premises are within a *controlled locality*, within 1.6 kilometres of a *controlled locality*, within 2 km of another HWB area or within an LPS designation. Where necessary, NHS England should go back to the applicant for clarification.
11. NHS England and applicants may find maps to be useful when establishing the *best estimate* for the location of proposed premises.

### Example

A *routine application* is received offering to secure an unforeseen benefit for a village. However, no premises have been secured and the applicant has given their *best estimate* for the pharmacy as the High Street. The village is very linear and this estimate covers a distance of two km.

A site visit is undertaken and it is noted that there are a number of commercial units in the village centre which is located between 41 and 55 High Street. The majority of the village is centred on this location, as well, although houses continue sporadically along the High Street to 145.

If the application is approved and the applicant subsequently locates the premises at 145 High Street, then it is unlikely to fully secure the desired better access due to the distance to be travelled to access the services.

NHS England decides it is not satisfied with the *best estimate* and asks the applicant to provide further information on a more precise location. The applicant subsequently submits a map which shows that they intend to open within one of the commercial units in the village centre.

NHS England is satisfied with this description of the applicant's *best estimate*.

12. If the applicant fails to provide either a precise location or a *best estimate* of the premises location within the *routine application*, this would be classed as missing relevant information for the purposes of **paragraph 11 of Schedule 2**.

13. Where an applicant submits a *routine application* for premises which are:

- already *listed chemist premises*; or
- are adjacent to or in close proximity to *listed chemist premises*.

**paragraph 6 of Schedule 2** requires the applicant to include in their application, details that explain why the application should not be refused pursuant to **regulation 31**.

14. Where the applicant is making an unforeseen benefits application, i.e. the application is offering to secure improvements or better access to *pharmaceutical services* that have not been identified in the PNA, having regard to:

- there being a reasonable choice with regard to obtaining *pharmaceutical services* in the area of the relevant HWB (taking into account also NHS England's duties under sections 13I and 13P of the 2006 Act (duty as to patient choice and duty as respects variation in provision of health services)); or
- people sharing a *protected characteristic* (for example, people of the same age group or with the same disability) having access to services that meet specific needs for services which, in the area of the relevant HWB, are difficult for them to access (taking into account also NHS England's duties under section 13G of the 2006 Act (duty as to reducing inequalities); and

- there being innovative approaches taken with regard to the delivery of *pharmaceutical services* (taking into account also NHS England's duties under section 13K of the 2006 Act (duty to promote innovation));

the applicant must explain in the application why they believe that approving it would confer significant benefits on people in the area of the relevant HWB that were not foreseen when the PCT or NHS England published its PNA (**regulation 18(2)(b) and paragraph 7(1)(b) of Schedule 2**). It is not sufficient simply to offer to provide a service or services for which there is no basis in the PNA. Unforeseen benefits applications must be fully evidenced.

## Additional information to be provided where the applicant is not already included in a pharmaceutical list

15. **Paragraph 2 of Schedule 2** requires the applicant to provide additional information where they are not already included in a pharmaceutical list in respect of other premises. Where the applicant is an individual, they are required to provide their full name, sex, date of birth, private address and phone number; a declaration that they are a registered pharmacist (i.e. they are registered with the GPhC), and if they have other premises registered with the GPhC, the registration number(s) for those premises.
16. If the applicant is a DAC, their premises are not required to be registered with the GPhC (there is no equivalent regulatory body for DACs) and they are not required to be a registered pharmacist.
17. Where the applicant is a partnership, they are required to provide:
  - each partner's full name, sex, date of birth, private address and telephone number; a declaration that they are a registered pharmacist (i.e. they are registered with the GPhC), and if they have other premises registered with the GPhC, the registration number(s) for those premises; and
  - a declaration that the applicant is, or is entitled to be, lawfully conducting a retail pharmacy business in accordance with section 69 of the Medicines Act 1968. DACs are not required to complete this declaration.
18. If the applicant is a DAC, their premises are not required to be registered with the GPhC (there is no equivalent regulatory body for DACs). Additionally, the partnership is not required to consist only of registered pharmacists.
19. Where the applicant is a body corporate, they are required to provide:
  - the registered name and any other name under which the applicant trades;



- the company’s registration number (this is their Companies House registration number);
  - the registered office for the body corporate and any fixed line telephone number relating to that office;
  - the private address and date of birth of the superintendent pharmacist (not required by DACs);
  - the name, private address and date of birth of each director (excluding the superintendent pharmacist), and if any director is a registered pharmacist, their GPhC registration number;
  - a declaration that the applicant is, or is entitled to be, lawfully conducting a retail pharmacy business in accordance with section 69 of the Medicines Act 1968 (DACs are not required to complete this declaration); and
  - if the applicant has other premises registered with the GPhC, the registration number(s) for those premises.
20. If the applicant is a DAC, their premises are not required to be registered with the GPhC.
21. **Paragraph 3 of Schedule 2** requires applicants to provide certain fitness to practise information on:
- the individual making the application; or
  - where it is a partnership, each partner; or
  - where it is a body corporate, the director(s) and (unless it is a DAC) the superintendent pharmacist.
22. **Paragraph 4 of Schedule 2** sets out further information that must be provided where the applicant is a body corporate and not already included in a pharmaceutical list for other premises.
23. Further information on these requirements can be found in separate guidance. NHS England must ensure that none of the information provided under **paragraphs 3 and 4 of Schedule 2** – and no private addresses, private telephone numbers or dates of birth – are circulated with the application as part of the notification exercise. NHS England must also ensure that all fitness to practise checks are completed and a decision made on the applicant’s suitability for inclusion in a pharmaceutical list before determining the *routine application* to secure unforeseen benefits.
24. Where the applicant is a body corporate with a registered office in England, **paragraph 5 of Schedule 2** makes provision for them, where they have already provided information under **paragraphs 3 and 4 of Schedule 2** to NHS England or a “Home

PCT” on a previous occasion, of not providing that information again to NHS England in relation to the current application (**paragraph 5(1) of Schedule 2**).

25. If the applicant wishes to use this flexibility, they must:
- confirm NHS England already has the information required under **paragraphs 3 and 4 of Schedule 2**; or
  - if there is any missing information required under those paragraphs, confirm to NHS England what information NHS England already has, and provide the missing information (**paragraph 5(2) of Schedule 2**).

### Undertakings to be provided by all applicants

26. In addition to the information required in **paragraphs 1 to 7 of Schedule 2**, applicants are required to provide the following undertakings:
- to notify NHS England within seven days of any material change to the information provided in the application (**paragraph 9(a) of Schedule 2**). This undertaking applies until whichever of the following events is the latest to take place:
    - the application is withdrawn;
    - the application is finally determined, be that by NHS England, or on appeal, the Family Health Services Appeal Unit (FHSAU) of the NHS Litigation Authority (NHSLA) or the First-Tier Tribunal (FTT), or following an appeal through the Courts; or
    - if the application is granted, when the applicant commences the provision of *pharmaceutical services*, to which the application relates.
  - to notify NHS England if they are included, or apply to be included, in any other *relevant list* (**paragraph 9(b) of Schedule 2**). This undertaking applies until whichever of the following events is the latest to take place:
    - the application is withdrawn;
    - the application is finally determined, be that by NHS England, or on appeal, the Family Health Services Appeal Unit (FHSAU) of the NHS Litigation Authority (NHSLA) or the FTT, or following an appeal through the Courts; or
    - if the application is granted, when the applicant commences the provision of *pharmaceutical services*, to which the application relates.
  - at the premises to which the application relates, to comply with all the obligations that are to be their terms of service under **regulation 11 (paragraph 9(c)(i) of Schedule 2)**;
  - in particular, to provide all the services and perform all the activities at proposed *pharmacy premises* that are required under the terms of service to be provided or

performed as, or in connection with, *essential services* (**paragraph 9(c)(ii) of Schedule 2**); and

- if the applicant is seeking to provide *directed services* as part of the application, an undertaking:
  - that they will provide the *directed services* if NHS England commissions them within three years of either the grant of the application or, if later, the listing in relation to the applicant of the premises to which the application relates;
  - if the services are commissioned by NHS England, that they will provide them in accordance with an agreed service specification; and
  - the applicant will not unreasonably withhold agreement to a service specification (**paragraph 9(d) of Schedule 2**).

### Agreed service specifications

As part of a *routine application* offering unforeseen benefits the applicant may offer to provide *directed services*.

If NHS England has a service specification then it is advisable to send it to the applicant at the point the *routine application* offering unforeseen benefits is received so that the applicant is aware of what they will be required to provide should the application be successful. If the applicant has not seen the specification in advance of submitting their application, they may be reluctant to give the undertakings required in **paragraph 9(d) of Schedule 2**. Where this is the case, NHS England should nevertheless request the applicant to give the required undertakings and only begin to process the application once these are received.

Where there is no such service specification, then NHS England must be able to describe the service in broad enough terms to allow itself flexibility, but narrow enough to allow the applicant to give the required undertakings in **paragraph 9(d) of Schedule 2**. Failure by NHS England to give sufficient information to allow the applicant to give the undertakings is not sufficient reason to delay the processing of the application. NHS England is therefore advised to ensure they have service specifications drafted for all the services identified within the PNA although this may not cover all the *enhanced services* included in a *routine application* offering unforeseen benefits.

27. The obligation on the applicant to provide information or documentation required by **paragraphs 1 to 7 and 9 of Schedule 2** is only discharged if NHS England is satisfied that no relevant information or documentation is missing (**paragraph 10 of Schedule 2**). NHS England must have good cause to believe that there is relevant information or documentation missing and must not use this provision simply to avoid determining, or to delay determining, an application.

## Preliminary matters to consider following receipt of an application

28. On receipt of a *routine application* offering unforeseen benefits, there are a number of preliminary matters which NHS England must consider before notifying the *routine application* to interested parties. These matters are set out in **Part 2 of Schedule 2** and in **paragraphs 32 to 45, 50 to 51** and the subsequent table below and NHS England may wish to develop a checklist to ensure they consider all the matters prior to notifying the application.

## Missing relevant information or documents

29. Where NHS England considers that the applicant has not provided all the relevant information or documentation, it may request that missing information or documentation and shall specify the timescale within which it is to be submitted (**paragraph 11(1) of Schedule 2**). NHS England should only request information or documentation that is required to determine the application i.e. information or documentation that is relevant to the application. NHS England should not request information that is not relevant to the application (see the example below).
30. The timescale must be reasonable and will depend on what information or documentation is required, for example, a timescale of one week may be reasonable to provide the GPhC registration number of the superintendent pharmacist required under **paragraph 1(6) of Schedule 2** but a longer period may be required to provide the fitness to practise information required under **paragraph 3 of Schedule 2** for all the partners in a partnership.
31. NHS England may make the request at any time between receiving and determining the *routine application* offering unforeseen benefits, but it must consider whether or not it needs to request missing information or documentation prior to notifying the application as required by **paragraph 18 of Schedule 2 (paragraph 11(3) of Schedule 2)**. In the interests of fairness and transparency and to make sure those notified of the application have all the relevant information, NHS England may wish to ensure they have any missing information or documentation prior to notifying the application.
32. The applicant is required to provide the information or documentation within the specified timescale and where they are unable to meet the timescale, they must notify NHS England of the delay (**paragraph 11(1)(b)(i) and (ii) of Schedule 2**). Additionally, they must tell NHS England if they are unable to meet the original timescale and specify a date by which the information or documentation will be provided (**paragraph 11(1)(b)(ii) of Schedule 2**). NHS England must be satisfied that the delay and the length of the delay are for good cause (**paragraph 11(2)(a)(ii) of Schedule 2**).

33. If the applicant refuses to comply with a request for missing information or documentation within the timescale specified by NHS England, or by any subsequent date specified by the applicant and agreed with NHS England, the application is to be treated as withdrawn by the applicant (**paragraph 11(2)(a)(ii) of Schedule 2**).
34. If the applicant considers that NHS England's request is not reasonable, they may notify NHS England of that and seek a review by NHS England of the reasonableness of the request – see box below (**paragraph 11(1)(b)(iii) of Schedule 2**).
35. If the applicant seeks a review, NHS England is required to reconsider its request for missing information or documentation. The 2013 Regulations are silent as to the procedure for this review. In the interests of fairness and transparency, the review should be conducted by a different person/committee to that which determined the information or documentation is missing.
36. If following the review, it is determined that any or all of the requested information or documentation must after all be provided, the applicant must be told of the timescale (which must be reasonable) within which it is to be provided. Should the applicant not comply with the request, then the application is to be treated as withdrawn by the applicant (**paragraph 11(2)(b)(i) of Schedule 2**).
37. If following the review, it is determined that the information or documentation need not be provided, the original request made under **paragraph 11(1) of Schedule 2** is to be treated as withdrawn i.e. the applicant is not required to provide it (**paragraph 11(2)(b)(ii) of Schedule 2**).

#### Example

A shared service agency receives a *routine application* offering unforeseen benefits for *essential* and *advanced services* in a locality. On checking the application, it is noted that the applicant has stated the pharmacy will be in premises that are currently residential. The agency asks the applicant to provide evidence that they have applied for or been given approval by the local planning department for change of use.

The applicant considers this request unreasonable as it is not material to their application and asks for a review to be undertaken.

NHS England's pharmacy application panel considers the request for a review and agrees that as this information is outside the requirements of the 2013 Regulations, the request is unreasonable. The applicant is advised that the request for that information is withdrawn.

## Failure to provide undertakings

38. On receipt of an application, NHS England should check that the applicant has given all the undertakings required by **paragraph 9 of Schedule 2**. If the applicant has failed to do this, NHS England must, prior to notifying the application, request them to do so within a reasonable timescale (**paragraph 12(1) of Schedule 2**).
39. If the applicant fails to comply with this request within NHS England's timescale, the application is to be treated as withdrawn (**paragraph 12(2) of Schedule 2**).

## Refusal prior to notification of applications because of the language requirement for some NHS pharmacists

40. Where NHS England receives a *routine application* offering unforeseen benefits, if the applicant has qualified as a pharmacist in Switzerland or an European Economic Area State other than the UK, NHS England must be satisfied that the applicant has the level of knowledge of English which is necessary for the provision of services in the relevant HWB area (unless the applicant is already on a pharmaceutical list) (**Regulation 30**).
41. If the *routine application* offering unforeseen benefits is from a person who is not already included in a pharmaceutical list at other premises, it will need to determine before notification whether or not it must refuse the application under **regulation 30 (paragraph 15 of Schedule 2)**.

### Example

A *routine application* is received from a pharmacist who is not already included in a pharmaceutical list at other premises.

Prior to notification, NHS England checks the fitness to practise information that is submitted with the application and it is noted that the pharmacist grew up in Argentina but qualified in Switzerland.

NHS England requests evidence of the level of knowledge of English and then meets with the pharmacist. After considering all the evidence, NHS England is not satisfied that the pharmacist has the level of knowledge of English which is necessary for the provision of *pharmaceutical services* in the HWB area. It therefore refuses the *routine application* under **regulation 30** and notifies the applicant of its decision and the reasons for it. Had the applicant qualified in Argentina, this regulation would not have applied as it would have been for the GPhC to resolve the issue of language competency prior to registration as a pharmacist.

## Refusal of applications on fitness to practise grounds prior to notification

42. Where NHS England receives a *routine application* offering unforeseen benefits from a person who is not already included in a pharmaceutical list at other premises, then prior to notification it must consider whether or not it must refuse that application under **regulation 33(1)** – mandatory refusal on fitness to practise grounds (**paragraph 16 of Schedule 2**).

### Example

NHS England receives a *routine application* from a pharmacist who is not already included in a pharmaceutical list. Prior to notifying the application to interested parties, it checks the fitness to practise information provided and it is noted that the pharmacist is the subject of a *national disqualification*. NHS England, therefore, refuses the application under **regulation 33(1)**.

## Matters to which NHS England must have regard and their consequences

43. Once all the above preliminary checks are completed, NHS England may then move on to the next stage of the process. **Regulation 18 (2)(a) to (c)** sets out a number of matters which NHS England must have regard to at this stage. NHS England will need to work through each of the matters, possibly using a template checklist. Where one of the matters relates to the application in hand, NHS England should check the consequence of that matter set out in **regulation 19(1) to (3)**.
44. The following table sets out the matters, their consequence and provides an explanation of each:

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Matters to have regard to when considering applications with unforeseen benefits – Regulation 18	Consequence of these matters – Regulation 19	Explanation
<p>18(2)(a) whether it is satisfied that granting the application would cause significant detriment to-</p> <p>(i) proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB; or</p> <p>(ii) the arrangements it has in place for the provision of pharmaceutical services in the area of the relevant HWB;</p>	<p>19(5) If NHS England is satisfied as mentioned in regulation . . . 18(2)(a), it must refuse the application.</p>	<p>Where an application:</p> <ul style="list-style-type: none"> <li>▪ offers to secure improvements or better access that were not included in the PNA; but</li> <li>▪ NHS England is satisfied that if they granted the application, it would lead to significant detriment either to the proper planning of <i>pharmaceutical services</i> provision, or to the arrangements in place for the provision of <i>pharmaceutical services</i>,</li> </ul> <p>NHS England must refuse the application.</p> <p>For example, an applicant submits a <i>routine application</i> offering <i>enhanced services</i> that were introduced after the date of the PNA. The proposed new pharmacy is in an area that is already well served with pharmacies, but which is next to an area of under-provision where NHS England is trying to encourage new</p>



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		<p>provision of <i>essential services</i>. If it grants the application, that will make it even more difficult to attract new <i>essential services</i> provision in the neighbouring area. NHS England therefore refuses the application because of the significant detriment to its proper planning that granting the application would cause.</p>
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45. Unlike *routine applications* that offer to meet a need or secure an improvement or better access that is identified within the HWB's PNA, when considering whether to defer an application that offers unforeseen benefits under **regulation 18(2)(c) to (e)**, NHS England will first need to form a preliminary view that an application of the type submitted will deliver significant benefits to people within the relevant HWB area as set out in **regulation 18(2)(b) (Regulation 18(3))**.
46. If NHS England reaches a preliminary view under **regulation 18(2)(b)** that no significant benefits of a type that was not foreseen when the PNA was produced would be delivered, there would be no purpose to it going on to invite other applications, or to consider the application with another one, or to await the outcome of an appeal.
47. In this situation, **regulation 22** requires NHS England to refuse the application, even if it believes granting it, or partially granting it would in fact secure improvements, or better access, to *pharmaceutical services*, or *pharmaceutical services* of a specified type, in the relevant HWB area. Unforeseen benefits applications do not provide an opportunity to reconsider issues that were raised at the time the PNA was produced, for example, if NHS England considered at that time suggested new *essential services* for a particular area were not in fact appropriate.

Market entry by means of pharmaceutical needs assessments – unforeseen benefits

Matters to have regard to when considering applications with unforeseen benefits – Regulation 18	Consequence of these matters – Regulation 19	Explanation
<p><i>18(2)(b) whether, notwithstanding that the improvements or better access were not included in the relevant pharmaceutical needs assessment, it is satisfied that, having regard to the desirability of-</i></p> <p><i>(i) there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB (taking into account also NHS England’s duties under sections 13I and 13P of the 2006 Act (duty as to patient choice and duty as respects variation in provision of health services)),</i></p> <p><i>(ii) people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access (taking into account also NHS England’s duties under section 13G of the 2006 Act)(duty as to reducing inequalities)), and</i></p>	<p><i>19(6) If NHS England is satisfied as mentioned in regulation 18(2)(b), it may grant the application notwithstanding that the improvements or better access were not included in the relevant pharmaceutical needs assessment.</i></p>	<p>Where NHS England is satisfied that although the improvements or better access that are offered in the application are not included within the relevant HWB PNA, they would lead to significant benefits to patients or other likely users, then it may grant the application.</p> <p>The significant benefits could be in offering services that meet the needs of particular groups, or the mode of service delivery is innovative and would make the service more accessible for likely users.</p>

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<p><i>(iii) there being innovative approaches taken with regard to delivery of pharmaceutical services (taking into account also NHS England;s duties under section 13K of the 2006 Act)(duty to promote innovation));</i></p>		
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48. After establishing that the application, if approved, would not cause significant detriment and would lead to significant unforeseen benefits:

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<p><i>18(2)(c) whether it is satisfied that it would be desirable to consider, at the same time as the applicant's application, applications from other persons offering to secure the improvements or better access that the applicant is offering to secure;</i></p>	<p><i>19(2) If NHS England is satisfied as mentioned in regulation 18(2)(c), it may-</i></p> <ul style="list-style-type: none"><li><i>(a) defer determination of the application;</i></li><li><i>(b) invite applications from other persons to offer to secure the improvements or better access mentioned that the applicant is offering to secure; and</i></li><li><i>(c) consider, at the same time as the applicant's application, any application it receives-</i><ul style="list-style-type: none"><li><i>(i) as a consequence of the invitation issued in accordance with sub-paragraph (b), or</i></li><li><i>(ii) that, even if it was not received in response to that invitation, is in any event from another person offering to secure the improvements or better access that the applicant is offering to secure, but it must not, pursuant to this paragraph, defer consideration of the application for longer than six months.</i></li></ul></li></ul>	<p>On receipt of an application, that offers to secure improvements or better access that were not identified in the PNA, NHS England needs to consider whether it wishes to invite other applications.</p> <p>If NHS England is satisfied that it wishes to consider applications from other persons to secure these unforeseen improvements or better access, then it may defer determining the application for up to six months whilst it invites applications from other persons.</p> <p>Once it has received any other applications to secure the same unforeseen improvements or better access (whether these were received as a result of the invitation or were unrelated to the invitation) NHS England would then consider and determine all the applications at the same time.</p> <p>However, NHS England must not defer consideration of the original application for longer than six months.</p>
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Market entry by means of pharmaceutical needs assessments – unforeseen benefits

<p><i>18(2)(d) whether it is satisfied that another application offering to secure the improvements or better access has been submitted to it, and it would be desirable to consider, at the same time as the applicant's application, that other application;</i></p>	<p><i>19(3) If NHS England is satisfied as mentioned in regulation . . . 18(2)(d), it may defer consideration of the application until it can be considered at the same time as the other application.</i></p>	<p>If NHS England decides that it wishes to consider application (A) with another application (B) that it has received offering to secure the same unforeseen improvements or better access, it may defer determining A until it can be determined at the same time as B.</p>
<p><i>18(2)(e) whether it is satisfied that an appeal relating to another application offering to secure the improvements or better access is pending, and it would be desirable to await the outcome of that appeal before considering the applicant's application;</i></p>	<p><i>19(4) If NHS England is satisfied as mentioned in regulation . . . 18(2)(e), it may defer consideration of the application until after the appeal has reached its final outcome.</i></p>	<p>NHS England has previously determined an application (A) that would secure the same unforeseen benefits as this application (B) but an appeal has been made against NHS England's decision. If NHS England decides that it wishes to wait to see what the outcome of the appeal on A is, then it may defer making a decision on B until the appeal decision is known.</p>
<p><i>18(2)(f) whether the application needs to be deferred or refused by virtue of any provision of Parts 5 to 7.</i></p>	<p><i>There is no consequence in regulation 19. NHS England should refer to Parts 5 to 7 of the 2013 Regulations.</i></p>	<p>Part 5 sets out three specific grounds for refusal or deferral of <i>routine applications</i> submitted under Part 3 of the 2013 Regulations. They do not relate to fitness to practise and are refusal due to language requirements for some NHS pharmacists; refusal for same or adjacent premises; and deferrals arising out of LPS designations.</p>

Market entry by means of pharmaceutical needs assessments – unforeseen benefits

		<p>Part 6 makes provision for refusal, deferral and conditional inclusion in pharmaceutical lists on fitness to practise grounds.</p> <p>Part 7 makes provision for the refusal and deferral of <i>routine applications</i> in <i>controlled localities</i>, in certain circumstances.</p>
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49. NHS England should note that they may only defer a *routine application* offering unforeseen benefits in order to invite other applications for up to six months (**Regulation 19(2)**). There are no time limits to the period of deferral where NHS England is awaiting the outcome of an appeal or where it wishes to consider the application with another that it has received.
50. While considering applications offering to meet the same unforeseen benefit together may be good practice and thus desirable in principle, NHS England should not do this where it would result in considerable delay to the determination of any particular application. NHS England may be notified informally that an application is to be expected in relation to the unforeseen benefit for which another application has already been received. **Paragraph 19 of Schedule 2** requires NHS England to give *notice* of a *notifiable application* as soon as is practicable. To delay the consideration of an application received on the basis that a further application may be received in the future could lead to serious delay and run the risk of legal or other challenge.
51. Care has to be taken that the power on the part of NHS England to consider applications together is not capable of being exploited by potential applicants who seek effectively to block consideration of earlier applications.

## Deferral of applications prior to notification

52. When NHS England receives a *routine application* offering unforeseen benefits it must consider as soon as is practicable and in any case prior to notifying the application, whether or not to defer consideration of that application under **Regulation 19 (paragraph 14(1) of Schedule 2)**.
53. If NHS England decides to defer consideration of the application before notification then as soon as it no longer has grounds to defer the application, it must proceed as soon as is practicable with the notification (**paragraph 14(2) of Schedule 2**). The only exceptions to this would be where the application has been withdrawn or NHS England is required to treat it as withdrawn.

### Example

NHS England receives a *routine application* from a DAC offering to provide an unforeseen benefit. It had, however, already received and refused an application offering the same unforeseen benefit. The FHSU is considering an appeal against that decision and NHS England therefore decides after completing its preliminary checks to defer this new application under **regulation 19(4)** until the outcome of the appeal is known.

NHS England is subsequently notified that the FHSU has dismissed the appeal. NHS England therefore goes on to notify those persons listed in **paragraph 19 of Schedule 2**. If the FHSU had instead allowed the appeal, NHS England would have been required under **paragraph 24 of Schedule 2**, to ask the applicant to update their application and if they wanted to proceed with the application before going on to notify it. If the applicant failed to respond, the application would be treated as withdrawn. If the applicant wished to proceed, in due course they would still need, by virtue of **regulation 18(2)(b)**, to satisfy NHS England that the application conferred “significant benefits”, which practicably speaking is likely to have become more difficult, having regard to the successful application that preceded it.

## Deferrals arising out of LPS designation

54. **Regulation 32** allows NHS England to defer a *routine application* offering unforeseen benefits as a result of a LPS designation where it so wishes. This is a discretionary power and NHS England may choose not to defer an application. NHS England is advised to document their reasons for deferring or not deferring.
55. NHS England must be satisfied that the *relevant premises* are:
  - premises or part of premises that are designated for LPS under **regulation 99** of the 2013 Regulations; or
  - located within an area that has been designated for LPS under **regulation 99** of the 2013 regulations.
56. NHS England must also be satisfied that the designation has not been varied so that it no longer applies to the *relevant premises* nor that it has been cancelled (**Regulation 32(2)**).
57. The *relevant premises* are defined in **regulation 32(3)** as:
  - the premises or proposed premises detailed in the application; or

- where no particular premises are listed in the application, the premises are located at the *best estimate* that NHS England is able to make as to where the premises will be. In coming to this best estimate, NHS England will have had regard to the *best estimate* that the applicant gave in their application as required by **paragraph 1(7)(a)(ii) of Schedule 2**. In practice, the *best estimates* should be the same.
58. This provision allows NHS England to defer a *routine application* offering unforeseen benefits whilst it is considering proposals for an LPS contract. NHS England may choose to use the power of designation, depending on local circumstances. The aim of a designation is to allow time for an LPS proposal to be worked up and procured. Designation therefore allows NHS England to mitigate the potentially adverse impact of any new community pharmacy beginning to operate in an area where the development or implementation of an LPS scheme is underway. This may be a critical factor where in some cases NHS England has to plan and commit to a longer-term development, for example commissioning and building new community health centre premises.
59. NHS England may wish to note that designations are subject to review and cancellation, particularly where an LPS scheme proposal has not been submitted to NHS England approval process within twelve months, beginning with the date of the original designation, or if the LPS procurement exercise is aborted. Further information on this subject can be found in separate DH guidance.

## Action following decisions to defer a routine application

60. Where NHS England decides to defer consideration or determination of a *routine application* then it must:
- notify the applicant of its decision and the reasons for it: and
  - where possible, notify the applicant of the length of time that the application is being deferred. If necessary, NHS England can refer to a future event as opposed to a period of time (**paragraph 24(1) of Schedule 2**)
61. NHS England may advise the applicant of this decision either before or after it has carried out the notification exercise. It is suggested that in most instances deferral will take place prior to notification.
62. Where NHS England decides to defer the *routine application* under **regulation 19(2)(a)**, it must invite other applications under **regulation 19(2)(b)** as soon as practicable and in such a manner as it sees fit (**paragraph 24(2)(a) of Schedule 2**).
63. Where NHS England decides to defer the *routine application* under **regulation 19(3)** it must, as soon as practicable, make arrangements to consider the other applications at the same time as this application (**paragraph 24(2)(b) of Schedule 2**).

64. Where NHS England decides to defer the *routine application* under **regulation 19(4)** it must, once the appeal has reached its final outcome, notify the applicant of that outcome. NHS England must also notify the applicant that they must then within a specified period of not less than 30 days update their application and notify NHS England whether or not they still wish to proceed with it (**paragraph 24(2)(c) of Schedule 2**). If the applicant informs NHS England within the specified period that they do not wish to proceed with the application, the application is to be treated as withdrawn (**paragraph 24(3) of Schedule 2**). If the applicant fails to respond in the required manner then the application is also to be treated as withdrawn.
65. Where NHS England decides to defer the *routine application* under **regulation 32**, it must:
- send the applicant a copy of the LPS designation that led to the decision;
  - where the designation that led to the decision to defer is cancelled or varied so that the routine application may no longer be deferred, review the decision to defer;
  - notify the applicant of the cancellation or variation; and
  - require the applicant within a specified period of not less than 30 days to update their *routine application* and to notify NHS England as to whether or not they still wish to proceed with it (**paragraph 24(2)(e) of Schedule 2**)

If the applicant informs NHS England within the specified period that they do not wish to proceed with the application, the application is to be treated as withdrawn by the applicant (**paragraph 24(3) of Schedule 2**). If the applicant fails to respond in the required manner, the application is also to be treated as withdrawn.

66. Where the applicant is not already included in a pharmaceutical list and NHS England decides to defer the *routine application* under **regulation 34**, once the outcome of the cause of that deferral is known, NHS England must notify the applicant that they must within a specified period of not less than 30 days update their application and notify NHS England whether or not they still wish to proceed with it (**paragraph 24(2)(f) of Schedule 2**).
67. If the applicant informs NHS England within the specified period that they do not wish to proceed with the application, the application is to be treated as withdrawn by the applicant (**paragraph 24(3) of Schedule 2**). If the applicant fails to respond in the required manner, the application is also to be treated as withdrawn.

## Notification

68. Once NHS England has considered the matters listed in **paragraphs 11 to 17** of Schedule 2 and has decided not to refuse the application under **paragraph 15, 16 or 17 of Schedule 2**, or to defer it, NHS England must give *notice* of a *routine application* offering unforeseen benefits to:
- any LPC whose area includes the premises or location to which the application relates, or any part of whose area is within 2 km of the premises or location to which the application relates;
  - the Local Medical Committee (LMC) whose area includes the premises or location to which the application relates, or any part of whose area is within 2 km of the premises or location to which the application relates;
  - any person in a pharmaceutical list whose interests NHS England believes might be significantly affected if the application were granted;
  - any person who is entitled to be included in a list because of the grant by NHS England or on appeal by the FHSAU, of a *routine* or *excepted application*, but who is not (yet) included, and whose interests NHS England believes might be significantly affected if the application were granted;
  - any LPS chemist with whom NHS England has made arrangements for the provision of any local pharmaceutical services in the area of the relevant HWB and whose interests NHS England believes might be significantly affected if the application were granted;
  - any Local Healthwatch organisation for the area of the relevant HWB, and any other patient, consumer or community group in the relevant area (for example Parish and Town Councils) which NHS England believes has a significant interest in the outcome of the application;
  - if the proposed premises within the application are in or are within 1.6 km of a *controlled locality* in the area of the HWB, any provider of primary medical services or any other person on the dispensing doctor list for the area of the relevant HWB if there is one (i.e. doctors on the list who are performers as opposed to providers) who NHS England believes has a significant interest in the outcome of the application; and
  - any other Local Health Board (LHB) any part of whose area is within 2 km of the proposed premises (**paragraph 19(1) of Schedule 2**).
69. Persons in the above list must receive notice of the application. NHS England is free to notify any other person who it believes has a significant interest in the outcome of the application for example MPs, councillors (**paragraph 19(2) of Schedule 2**).
70. It is recommended that NHS England records its reasoning for why it believes persons have a significant interest in the outcome of the application.

71. Other than LPCs, LMCs and LHBs, NHS England should note the requirement to notify only those who it believes might be significantly affected if the application were granted, or those it believes have a significant interest in the outcome. NHS England will therefore need to identify those relevant persons rather than automatically notifying everyone on a pharmaceutical list, dispensing doctor list and all providers of primary medical services.

### Example

NHS England receives a *routine application* offering unforeseen benefits and after completing its preliminary checks is ready to notify it as required by **paragraph 19 of Schedule 2**. The application is for premises on the outskirts of a town and is within 1 km of a *controlled locality*. Using the Exeter system, NHS England identifies all the dispensing patients living within the *controlled locality* and within 1.6 km of the proposed premises. It identifies that three GP practices have dispensing patients within this area. One practice has five dispensing patients, one has 300 dispensing patients and the other has 500 dispensing patients within this area. NHS England decides that the practice with only five dispensing patients in the area would not have a significant interest in the outcome of the application and does not notify them of the application. This decision is noted in the paperwork for the application.

72. Where any part of the area of another HWB other than the relevant HWB is within 2 km of the premises or location to which the application relates, NHS England must also give *notice* to:
- any LPC whose area includes that part of the area and that is not given *notice* of the application under paragraph (1)(a) and (b) of Schedule 2;
  - any LMC whose area includes that part of the area and that is not given *notice* of the application under paragraph (1)(a) and (b) of Schedule 2;
  - any person in a pharmaceutical list whose interests NHS England believes might be significantly affected if the application were granted;
  - any person who is entitled to be included in a list in the second HWB area because of the grant of a *routine* or *excepted application*, but who is not (yet) included, and whose interests NHS England believes might be significantly affected if the application were granted;
  - any LPS chemist with whom NHS England made arrangements for the provision of any local pharmaceutical services in the area of the second HWB and whose interests NHS England believes might be significantly affected if the application were granted;
  - any Local Healthwatch organisation for the area of the second HWB, and any other patient, consumer or community group in that area which NHS England believes has a significant interest in the outcome of the application; and
  - if the proposed premises within the application are within 1.6 km of a *controlled locality* in the area of the second HWB, any provider of primary medical services or any other person on the dispensing doctor list for the area of the second HWB where

there is one (i.e. doctors on the list who are performers as opposed to providers) who NHS England believes has a significant interest in the outcome of the application (**paragraph 19(3)(a) of Schedule 2**).

73. Those persons who have been notified may make written representations about the application to NHS England within 45 days of the date on which *notice* of the application was given to them (**paragraph 19(4) of Schedule 2**)

## Parallel notifications

74. There may be occasions where a *routine application* offering unforeseen benefits will result in premises opening in an area that is or may be a *controlled locality*. This will require NHS England to consider whether or not it needs to make or revise a determination as to whether or not an area is a *controlled locality*, or is part of a *controlled locality*. Where this is the case it must give *notice* of the *routine application* at the same time as it gives *notice* of its intention to make such a determination under **regulation 38(1) (paragraph 20(1) of Schedule 2)**.
75. Once NHS England has issued notice under **regulation 38(1)** it must defer consideration of any *routine application* where:
- the applicant is seeking the listing of *pharmacy premises*, and
  - the outcome of the *routine application* could be affected by NHS England's decision as to whether the area is or is not a *controlled locality*, or is or is not part of a *controlled locality* (**Regulation 38(4)**).
76. If the *routine application* is deferred **paragraph 24(2)(g) of Schedule 2** requires NHS England to proceed with the determination of whether the area is or is not a *controlled locality*, or is or is not to be part of a *controlled locality* as soon as practicable.
77. The *routine application* is deferred until:
- NHS England has determined whether the area in question is or is not a *controlled locality*, or is or is not part of a *controlled locality*, and
  - the proceedings relating to that determination have reached their final outcome (i.e. any appeal to the FHS AU has been heard) (**Regulation 38(4)**).
78. NHS England may also receive a *routine application* offering unforeseen benefits that requires it to consider whether or not the proposed premises are within a *reserved location*. Where this is the case it must consider giving *notice* of the *routine application* at the same time as it gives *notice* of its intention to make such a determination under **regulation 41(4) (paragraph 20(2) of Schedule 2)**.

79. See chapter 14 for further information on *controlled localities* and *reserved locations*.
80. If NHS England wishes to consider two or more applications together and in relation to each other for example where it has deferred a *routine application* offering unforeseen benefits under **regulation 19(2)** in order to invite other applications to offer the same unforeseen benefit, then it is required by **paragraph 22(3) of Schedule 2** to give *notice* of its intention to do so.

## Content of notifications

81. **Paragraph 21(1) of Schedule 2** sets out the information that must be contained within the notification letter. As well as sending a copy of the application, NHS England must inform those it is notifying:
- of their right to make representations under **paragraph 19(4)**;
  - of the circumstances in which notified persons would be permitted to make oral representations should NHS England subsequently decide to hold an oral hearing; and
  - where NHS England intends to consider the application at the same time as another application, notification of that intention (**paragraph 21(1)(a) of Schedule 2**)
82. When notifying of applications NHS England must ensure that they send sufficient information to enable those notified to make informed representations as to whether or not the application should be granted (**paragraph 21(1)(b) of Schedule 2**). NHS England is not, however, required to provide copies or excerpts of the PNA with the notification letter (**paragraph 21(2) of Schedule 2**).
83. NHS England must not send any private, personal information or fitness to practise information provided by the applicant under **paragraphs 2 to 4 (paragraph 21(3) of Schedule 2)**. This includes any private addresses, private telephone numbers or dates of birth that may have been supplied.
84. If the applicant advises that they consider:
- any information that they have supplied as part of the application to be confidential; and
  - that they do not consent to that information being disclosed as part of the notification

NHS England must withhold that information if it believes that the full disclosure principle does not require it to provide that information to those notified of the application



(**paragraph 21(4) of Schedule 2**). If NHS England does withhold any information under **paragraph 21(4) of Schedule 2**, it must inform those notified of the application of the nature of the information that is being withheld (**paragraph 21(6) of Schedule 2**).

85. The full disclosure principle means that information that is relevant to the determination of an application should be available to any individual who has a significant interest in the outcome of the application. The only exception is where it is fair and proper for that information to be withheld (**paragraph 21(5) of Schedule 2**) from that individual. Where NHS England is in any doubt as to whether the full disclosure principle applies it should seek legal advice.

### Example

A pharmacist who is currently employed at a local pharmacy submits a *routine application* offering unforeseen benefits. They request that their name is removed from all the documentation before it is circulated, as they do not wish their employer to know they are applying.

The full disclosure principle applies in this case and therefore NHS England is required to disclose who is applying.

## Flexibility with regard to determining or deferring applications

86. NHS England is able to determine or defer a *routine application* offering unforeseen benefits as it sees fit, unless the Regulations provide to the contrary (**paragraph 22(1) of Schedule 2**). An example of this is **paragraph 26 of Schedule 2** which sets out who cannot take part in the decision-making process.
87. NHS England may determine a *routine application* without holding an oral hearing if it considers that oral representations are unnecessary (**paragraph 22(2) of Schedule 2**). Where a decision is taken not to hold an oral hearing, it is good practice to document that decision.
88. NHS England may consider two or more applications together and in relation to each other, but must give *notice* of this intention (**paragraph 22(3) of Schedule 2**). This should be done as part of the notification exercise. However, if NHS England decides after the notification exercise that it wishes to consider two or more applications then it may do so but it must give *notice* of this to the applicants concerned before determining their applications.

## Oral hearings

89. Oral hearings are not required to be held for every application decision and NHS England should make a judgement on when it is necessary to do so. This is likely to be based on the complexity of the application, previous applications in the area and any appeals particularly upheld appeals to the FHSAU regarding those applications, and the number and type of representations made in respect of the application from those notified of it.
90. If NHS England decides to hear oral representations prior to determining a *routine application* offering unforeseen benefits then it must:
- give the applicant and any *additional presenters* not less than 14 days *notice* of the time and place for the oral hearing; and
  - advise the applicant who else has been invited to make representations at the hearing. This may include other applicants where NHS England has decided to determine two or more applications together (**paragraph 25(1) of Schedule 2**)
91. **Paragraph 25(2) of Schedule 2** defines a person as an *additional presenter* if:
- the application to which the hearing applies is a *notifiable application* (which all *routine applications* are);
  - they were given *notice* of the application and made representations in accordance with **paragraph 19(4)**. As part of the representations, the person must have indicated that they would wish to make oral representations if an oral hearing took place, and they must have identified a matter about which NHS England considers it would be desirable to hear further evidence about from the person at the oral hearing; and
  - NHS England is satisfied that the person made a reasonable attempt to express their views adequately on the application in their written representation.
92. Written representations must therefore take a view on whether the application should be refused or granted, and the reasoning for that view. It is for NHS England to decide whether they wish to hear further evidence on those reasons at the oral hearing. NHS England should note that simply saying that you would wish to attend an oral hearing without giving a view on the application is not sufficient. If a person notified of an application does not state in their written representations that they would wish to make oral representations then NHS England is not required to invite them to an oral hearing if it decides to hold one.
93. If NHS England decides at or after the oral hearing that an application is to be deferred, it may hold a further oral hearing once the period of deferral has expired if it so wishes (**paragraph 25(3) of Schedule 2**). This is a matter for NHS England to make a decision on and it is not obliged to hold a further hearing.

## Persons barred from taking part in decision making on routine applications

94. **Paragraph 26 of Schedule 2** sets out a list of persons who may take no part in determining or deferring any *routine application* offering unforeseen benefits. Further information on this can be found in Chapter 3.

## Timetable for determining applications

95. **Paragraph 27 of Schedule 2** requires NHS England to determine the *routine* application as soon as it is practicable to do so and within four months of the date on which all the required information and documentation was received by NHS England (**paragraph 27(b)(i) of Schedule 2**).
96. The only exceptions to this timescale are where NHS England has deferred the application under the 2013 Regulations or where it has good cause for a delay. The table below summarises when the timescale starts and stops.

Scenario	Point at which four month period starts
NHS England receives a deficient <i>routine application</i>	The four-month period initially starts at the point the application is received. It then stops at the point NHS England discovers it is deficient, for example, not all the relevant information or documentation is received, NHS England is not satisfied with the applicant's <i>best estimate</i> of the location of the premises. It then restarts at the point all the relevant information or documentation is received.
NHS England defers a <i>routine application</i> offering unforeseen benefits in order to invite other applications offering those same unforeseen benefits	The four-month period initially starts at the point the application is received. It then stops at the point NHS England decides to defer it in order to invite other applications. It then restarts at the closing date for invited applications as long as the original application is not delayed for more than six months. If NHS England wishes to defer and invite other applications this must be done promptly.

<p>NHS England defers a <i>routine application</i> offering unforeseen benefits in order to consider it with a later one.</p>	<p>The four-month period initially starts at the point the first application is received. It then stops at the point NHS England decides to defer it in order to consider it alongside another application. It then restarts at the point the second application catches up with the original one.</p>
<p>NHS England defers a <i>routine application</i> offering unforeseen benefits to await the outcome of an appeal on another application offering to meet the same need.</p>	<p>The four-month period initially starts at the point the first application is received. It then stops at the point NHS England decides to defer it in order to wait for the appeal decision. It then restarts at the point the appeal decision is known.</p>
<p>NHS England decides to defer a <i>routine application</i> where the proposed premises are located in an LPS designation.</p>	<p>The four-month period initially starts at the point the application is received. It then stops at the point NHS England decides to defer it due to an LPS designation. It then restarts when the proposed premises no longer fall within that designation.</p>
<p>NHS England defers an application for inclusion in a pharmaceutical list by a person not already included in it on fitness to practise grounds (<b>Regulation 34</b>).</p>	<p>The four-month period initially starts at the point the application is received. It then stops at the point NHS England decides to defer it on fitness to practise grounds set out in <b>regulation 34</b>. It then restarts when the outcome of the cause for deferral is known.</p>

97. Good cause for delaying an application will very much depend on the facts of the case.

### Example

NHS England receives a relocation application under **regulation 24** from an existing pharmacy that wishes to move to part of a new health centre. NHS England duly notifies interested parties under **paragraph 19 of Schedule 2**.

Halfway through the notification period it receives a *routine application* for the same location which is offering to provide unforeseen benefits. As the *routine application* is offering to provide *enhanced services*, NHS England decides it has good cause to defer the relocation application to consider it with the *routine application*.

If however NHS England decides that it does not have good cause to defer the relocation application, then it would need to be satisfied before granting it that doing so was not to the significant detriment of proper planning of the provision of *pharmaceutical services* in the area of the relevant HWB (**Regulation 24(1)(c)**).

## Determining the application

98. Where NHS England receives a *routine application* that will lead to improvements, or better access, that were not identified within the PNA, and having regard to the desirability of:
- there being a reasonable choice with regard to obtaining *pharmaceutical services* in the relevant HWB area; or
  - people who share a *protected characteristic* (for example, disabilities) having access to services that meet specific needs for *pharmaceutical services* that are difficult for them to access; or
  - there being innovative approaches taken with regard to the delivery of *pharmaceutical services*,

and granting it would confer significant benefits on persons in the HWB area which were not foreseen when the PNA was published, section 129(2A) of the 2006 Act requires NHS England to consider and be satisfied about certain matters (**Regulation 18(2)**).

99. This subsection of the 2006 Act states:

*(2A) The Board is satisfied as mentioned in this subsection if, having regard to the needs assessment for the relevant area and to any matters prescribed by the Secretary of State in the regulations, it is satisfied that to grant the application would (a) meet a need in that area for the services or some of the services specified in the application or (b) secure improvements, or better access, to pharmaceutical services in that area.*

100. This means that if NHS England is satisfied, having taken into account additional matters set out in the Regulations, that granting the application would secure improvements or better access to *pharmaceutical services* that have not been identified in the PNA, then it has the power to do so.
101. The matters referred to in this Section of the 2006 Act and in **regulation 18** and in Parts 5<sup>3</sup>, 6<sup>4</sup> and 7<sup>5</sup> of the Regulations. For each matter set out in **regulation 18**, there is a consequence set out in **regulation 19**. NHS England will therefore need to read the two regulations in conjunction.

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<sup>3</sup> Regulations 30 to 32 i.e. refusal due to language requirements, refusal due to same or adjacent premises and deferrals due to LPS.

<sup>4</sup> Regulations 33 to 35 i.e. refusal or deferral or conditional inclusion on fitness to practise grounds

<sup>5</sup> Regulations 40 and 44 i.e. refusal because of preliminary matters in controlled localities, refusal due to the prejudice

102. NHS England will need to work through each of the matters set out in **regulation 18(2)**; possibly using a template checklist. Where one of the matters relates to the application in hand, they should check the consequence of that matter set out in **regulation 19**.
103. Effectively, **regulations 18 and 19** inform the decision that NHS England will come to on *routine applications* that have been submitted to offering unforeseen benefits identified in the PNA.
104. If the application does not meet the first test set out in **regulation 18(2)(a)**, it must be refused and NHS England is not required to consider the remainder of the matters set out in that regulation

## Deferral whilst a determination relating to a controlled locality is made

105. As covered above, NHS England may have deferred the *routine application* whilst it made a determination as to whether or not the premises in the application are in a *controlled locality*.
106. Once the proceedings have reached their final outcome NHS England may no longer defer the *routine application*. It may be that once the determination has been made that the applicant wishes to withdraw their application. In the absence of any communication to this effect from the applicant, NHS England should continue to deal with the *routine application*.
107. If it has been determined that the premises are within a *controlled locality* and NHS England approves the *routine application* it will need to consider what action it needs to take under **regulation 50(4) or (5)** (postponement of the discontinuation of arrangements for the provision of *pharmaceutical services* by doctors). Further information on this can be found in Chapter 15.

## Refusal, deferral and conditional inclusion in pharmaceutical lists of chemists on fitness to practise grounds

108. Where the applicant is not already included in a pharmaceutical list they will also have to have submitted information on their fitness to practise (**paragraphs 2 to 4 of Schedule 2**). NHS England may process this information either in advance of processing the *routine application* offering unforeseen benefits, or alongside. Whichever course of action is taken, NHS England must come to a decision on the fitness to practise information in advance of the *routine application*. It is not possible for NHS England to approve the *routine application*, subject to the satisfactory approval of the fitness to practise information.

109. Part 6 of the 2013 Regulations sets out the grounds on which NHS England:
- must or may refuse the *routine application* for inclusion in its pharmaceutical list on fitness to practise grounds (**Regulation 33**);
  - may defer consideration of the *routine application* for inclusion in its pharmaceutical list on fitness to practise grounds (**Regulation 34**); and
  - may grant the *routine application* for inclusion in a pharmaceutical list subject to efficiency conditions and conditions to combat fraud (**Regulation 35**).
110. Further information on these provisions can be found in guidance issued by DH.
111. Where the *routine application* has been made by someone who is not already included in a pharmaceutical list in respect of other premises, there are additional actions that NHS England must undertake prior to determining the *routine application*. **Paragraph 23(1) of Schedule 2** requires NHS England to:
- where the applicant is an individual, check with the NHS Business Services Authority (NHS BSA) Counter Fraud Service, now known as NHS Protect<sup>6</sup> whether the applicant has any record of, or is under investigation for, fraud;
  - where the applicant is a body corporate, check with NHS Protect whether any director or the superintendent pharmacist has any record of, or is under investigation for, fraud;
  - where the applicant is an individual, check whether the Secretary of State who has delegated this function to the NHS Litigation Authority (NHSLA)<sup>7</sup> holds any information on the applicant that is relevant to NHS England's consideration of whether the application should be refused or deferred under **regulation 33 or 34** (i.e. on fitness to practise grounds) or whether conditions should be imposed under **regulation 35** (i.e. conditional inclusion). This information can be accessed by NHS England via a secure website;
  - where the applicant is a body corporate, check whether the NHSLA holds any information on any director or the superintendent pharmacist that is relevant to its consideration of whether the application should be refused or deferred under **regulation 33 or 34** or whether conditions should be imposed under **regulation 35** (i.e. conditional inclusion). This information can be accessed by NHS England via a secure website; and
  - take up references from the referees provided under **paragraph 3(8) of Schedule 2** and check those references.

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<sup>6</sup> <http://www.nhsbsa.nhs.uk/fraud>

<sup>7</sup> <http://www.fhsaa.tribunals.gov.uk/index.htm>

112. Once NHS England has received and considered any information received as a result of these checks, it must consider whether:
- the *routine application* should be refused or deferred under **regulations 33** or **34**; or
  - conditions should be imposed on the applicant under **regulation 35**.
113. If NHS England is minded to impose conditions under **regulation 35** (conditional inclusion) then before it decides that it will impose conditions, it must notify the applicant of its intention. This must take place at least seven days before the determination that conditions will be imposed, and the applicant must be given the opportunity to make written or, potentially, oral representations before NHS England makes its decision (**paragraph 23(2) of Schedule 2**).

## Refusal: same or adjacent premises

114. Where the premises within a *routine application* offering unforeseen benefits are:
- already included in a pharmaceutical list; or
  - adjacent to or in close proximity to premises that are already included in a pharmaceutical list,

the applicant will have had to explain why their application should not be refused pursuant to **regulation 31**.

115. NHS England must refuse a *routine application* offering unforeseen benefits where:
- a person on a pharmaceutical list (which doesn't have to be the applicant) is providing (or has undertaken to provide) *pharmaceutical services* from the premises mentioned in the application or from adjacent premises; and
  - NHS England is satisfied that it is reasonable to treat the applicant's proposed services as part of those services that are already being provided, and so the premises listed in the application and the existing premises should be treated as the same site (**Regulation 31(2)**).
116. The purpose of this regulation is to prevent a contractor from applying for multiple inclusions in a pharmaceutical list at the same address with no benefit to patients.



## Conditions relating to directed services

117. Where a *routine application* offering unforeseen benefits is made under the 2013 Regulations and as part of the application, the applicant undertook:

- to provide the *directed services* mentioned in the application, if NHS England commissioned them within three years of the date the premises are included in a pharmaceutical list;
- if the *directed services* were commissioned by NHS England, to provide them in accordance with an agreed service specification; and
- not to unreasonably withhold agreement to the service specification,

**regulation 66(4)** states that their inclusion in a pharmaceutical list is subject to the condition set out in **regulation 66(5)**.

118. This condition is that at those premises the applicant must:

- provide the *directed services* (and this condition applies to any future owners of the listed premises); and
- not unreasonably withhold agreement to the service specification.

119. However, for the condition to apply, NHS England is required to commission the services within three years of the date on which the premises are included in a pharmaceutical list.

120. The condition takes effect on the date which NHS England may, under **regulation 66(6)(a)** specify as the date on which service provision is to commence, or alternatively the date that NHS England and contractor can agree as a mutually convenient commencement date for the *directed services* (**Regulation 66(6)(b)**), whichever is the sooner.

NHS England may not vary or remove the condition imposed by virtue of **regulations 66(3) to (5)**.

### Example

A *routine application* offering unforeseen benefits is submitted to NHS England. As part of the application the applicant is offering to provide minor ailments, witnessed methadone consumption and needle exchange.

NHS England has already agreed service specifications for the *enhanced services* which are being provided by pharmacies within the relevant HWB area. The only exception is the needle exchange service which NHS England is in the process of commissioning and has received applications from other contractors indicating that they find the service specification acceptable. Following discussions with NHS England the applicant advises that it is not willing to provide this service as it is felt that the requirements are too onerous.

In this instance, as other contractors find the service specification to be acceptable, it would be unreasonable for the applicant to withhold agreement of the specification. The applicant fails to provide the undertaking to provide the service as required by **paragraph 9(d) of Schedule 2** and therefore the *routine application* is treated as withdrawn by virtue of **paragraph 12(2) of Schedule 2**.

If the *routine* application was granted and a year later NHS England finally set the remuneration for the needle exchange service, which both the new contractor and the other contractors considered was not acceptable, then it would not be unreasonable for the new contractor to withhold agreement to the service specification and they would not be in breach of the **regulation 66(5)(b)** condition of their listing.

## Notification, taking effect of decisions and rights of appeal

121. Once NHS England has made a decision on the *routine application* it must as soon as practicable notify certain persons of its decision (**paragraph 28(1) of Schedule 2**).
122. The 2013 Regulations make provision for certain persons to have a right of appeal against NHS England's decisions. Where an appeal right is provided in accordance with the Regulations a person who is entitled to appeal must be provided with the following:
  - notification of their right to make an appeal;
  - confirmation of their entitlement to make an appeal within 30 days from the date of NHS England's letter;
  - information on the FHSAU's contact details including address, e-mail and fax and telephone numbers. These can be found on the NHSLA's website<sup>8</sup>. If there is a right of appeal on a matter related to fitness to practise, the appeal is to the FTT<sup>9</sup> and its contact details must instead be provided by NHS England.

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<sup>8</sup> <http://www.nhsla.com/ContactUs/>

<sup>9</sup> <http://www.fhsaa.tribunals.gov.uk/AboutUs.htm>

123. It should be noted that rights of appeal should still be given to those persons who are entitled to be given rights even in the event of the decision being in favour of them. There may potentially be a part of the decision which they do not agree with and are therefore entitled to appeal this part of the decision.

## Notification of decisions

124. The persons who must be notified as soon as practicable of NHS England's decision are:

- the applicant;
- the LPC whose area includes the premises or location to which the application relates, or any part of whose area is within 2 km of the premises or location to which the application relates;
- the LMC whose area includes the premises or location to which the application relates, or any part of whose area is within 2 km of the premises or location to which the application relates;
- any person who is included in a pharmaceutical list, or who is entitled to be because their application has been granted but they have not yet been included, and whose interests NHS England believes might be significantly affected by the decision;
- any LPS chemist with whom NHS England has made arrangements for the provision of any local pharmaceutical services in the area of the relevant HWB and whose interests NHS England believes might be significantly affected by the decision;
- any Local Healthwatch organisation for the area of the relevant HWB, and any other patient, consumer or community group in the relevant area and which NHS England believes has a significant interest in the decision;
- if the proposed premises are in or within 1.6 km of a *controlled locality* in the area of the relevant HWB, any provider of primary medical services or any other person (who is a performer but not a provider of primary medical services) on the dispensing doctors list for the area of the relevant HWB if there is one, who NHS England believes has a significant interest in the decision;
- any other persons that NHS England notified under **paragraph 19(2) of Schedule 2** (other persons who in the opinion of NHS England have a significant interest in the outcome of the application) and who made representations about the application under **paragraph 19(4) of Schedule 2**; and
- any other LHB any part of whose area is within 2 km of the proposed pharmacy premises to which the decision relates (**paragraph 28(1) of Schedule 2**).

125. This list may well be the same as the list of persons who were initially notified of the application. However, NHS England should check whether there have been any other applications that have been approved by either NHS England or on appeal the FHSU or courts. This is because the person who submitted that other application may need to be notified of the decision on this later application if NHS England believes their interests may be significantly affected by this decision.

126. The requirement is to notify the decision as soon as is practicable. NHS England should aim to notify decisions within a week unless they have good cause not to do so. Each notification of the decision must include a statement from NHS England of the reasons for that decision (**paragraph 28(6) of Schedule 2**).
127. If NHS England decides to consider two or more applications together pursuant to **paragraph 22(3) of Schedule 2**, it must give *notice* to each applicant of the decision taken with regard to the other application(s) considered with their application (**paragraph 28(5) of Schedule 2**).
128. If any part of the area of a notified HWB other than the relevant HWB is within 2 km of the premises or location to which the application relates, NHS England is required by **paragraph 28(2) of Schedule 2** to notify certain persons of the decision as soon as is practicable. Those persons are:
- any LPC whose area includes that part of the area and that is not given *notice* of the application under paragraph (1)(b);
  - any LMC whose area includes that part of the area and that is not given *notice* of the application under paragraph (1)(c);
  - any person who is included in a pharmaceutical list, or who is entitled to be because their application has been granted but they have not yet been included, and whose interests NHS England believes might be significantly affected by the decision;
  - any LPS chemist with whom NHS England made arrangements for the provision of any local pharmaceutical services in the area of the second HWB and whose interests NHS England believes might be significantly affected by the decision;
  - any Local Healthwatch organisation or other patient, consumer or community group in the area of the second HWB which NHS England believes has a significant interest in the decision; and
  - if the proposed premises are within 1.6 km of a *controlled locality* in the area of the neighbouring HWB, any provider of primary medical services or any other person on the dispensing doctors list for the area of the neighbouring HWB where there is one (and who is a performer but not a provider of primary medical services), who NHS England believes has a significant interest in the decision.
129. The requirement is to notify the decision as soon as is practicable. NHS England should aim to notify decisions within a week unless they have good cause not to do so.

### Template notice of commencement to be included with a notice of decision

130. If NHS England grants the *routine application*, it must send, with its decision letter, a *notice of commencement* for the applicant to complete and send when it is ready to start service provision. The *notice of commencement* must contain the following information:

- the address of the premises to which the application relates;
- the services that are to be provided from those premises i.e. *essential* and any *directed services*;
- the date of the grant of the application;
- a declaration with regard to when the applicant intends to commence the provision of those services at those premises;
- in the case of pharmacy premises, the GPhC registration number of those premises; and
- a signature on behalf of the applicant and the date of *notice* (**paragraph 29 of Schedule 2**)

131. NHS England may wish to pre-populate parts of the notice where it holds the information.

## Appeals to the Secretary of State by the applicant

132. **Paragraph 36(1) of Schedule 2** gives the applicant rights of appeal against certain NHS England decisions. The right of appeal on decisions that are not fitness to practise related is to the Secretary of State who has delegated this function to the FHSAU. The applicant may appeal against a decision by NHS England:

- to refuse the application on grounds set out in Parts 3 to 5 or 7 of the 2012 Regulations;
- where NHS England is not satisfied that a notification under **paragraph 31 of Schedule 2** is valid (notification of premises where a *best estimate* was given in the original application);
- to refuse to accept that a notification under **paragraph 32(2) of Schedule 2** is a valid notification (a change to the premises listed in the original application prior to opening);
- to refuse a request for an extension to the period within which to open under **paragraph 34(4)(c)(i) of Schedule 2**; or
- to give *notice* under **paragraph 35 of Schedule 2** requiring the commencement of *pharmaceutical services*.

133. The *notice* of appeal is only valid if it includes a concise and reasoned statement of the grounds of the appeal (**paragraph 36(2) of Schedule 2**).

134. Applicants may appeal against decisions to refuse, even where NHS England is required to refuse in the circumstances that apply. It may of course be a matter of dispute between the applicant and NHS England as to whether those circumstances do in fact

apply. The following regulations in Part 3 are those where NHS England is required to refuse *routine applications* in specified circumstances:

- Regulation 14(4);
- Regulation 16(5) ;
- Regulation 19(5);
- Regulation 21(5); and
- Regulation 22.

135. Applicants may appeal against decisions to refuse under the following regulations in Part 5, even though NHS England is required to refuse *routine or excepted applications* if the specified circumstances do in fact apply:

- Regulation 30; and
- Regulation 31.

136. Applicants may appeal against decisions to refuse under the following regulations in Part 7, even though NHS England is required to refuse *routine applications* if the specified circumstances do in fact apply:

- Regulation 40; and
- Regulation 44.

### Third party rights of appeal to the Secretary of State where an application is granted

137. **Paragraph 30(1) of Schedule 2** gives third party rights of appeal against certain NHS England decisions. The 2013 Regulations refer to these as third party rights of appeal as they are persons other than those who are party to the application and decision i.e. persons other than the applicant and NHS England. The right of appeal is to the Secretary of State who has delegated this function to the FHSAU.

138. If NHS England considers that a person notified under **paragraph 28 of Schedule 2** is a person with third party rights of appeal then it is required to notify them of that fact in their decision letter (**paragraph 30(4) of Schedule 2**).

139. **Paragraph 30(2)** confirms that for the purposes of **Schedule 2** a person has third party rights of appeal if they were entitled to receive notification of the decision to grant the application by virtue of **paragraph 28(5) of Schedule 2** – i.e. they were notified because

their application was considered together with and in relation to the application to which the decision letter relates.

140. Other persons with third party rights of appeal are those:

- who were required to be notified of the application because they are on a pharmaceutical list or are entitled to be because their application has been granted but they have not yet been included, and whose interests NHS England believed might be significantly affected by the decision. This could be those in the original HWB area and those notified of the application in the area of the neighbouring HWB, any part of whose area is within 2 km of the proposed premises and was given *notice* of the application;
- had made written representations about the application under **paragraph 19(4) of Schedule 2**; and
- where NHS England was satisfied that within their written or oral representations they had made a reasonable attempt to express their grounds for opposing the application. Their grounds for opposing the application must not amount to a challenge to the legality or reasonableness of the HWB or Primary Care Trust (PCT)'s PNA or to the fairness of the process by which the HWB or PCT undertook that assessment and must not be vexatious or frivolous (**paragraph 30(3) of Schedule 2**)

141. NHS England should not give third party rights of appeal to all persons included in a pharmaceutical list or entitled to be included in that list who made representations. NHS England must consider carefully to whom it gives third party appeal rights and should not give them to persons who did not make a reasonable attempt to express their grounds for opposing the application.

142. Third party rights of appeal may not be given to LPCs, LMCs, LPS chemists, GPs, Healthwatch or other patient, consumer or community groups.

### Example

Following notification of a *routine application* offering unforeseen benefits, NHS England received a number of responses. Several responses did not indicate whether or not they supported the application. These persons were not given third party rights of appeal as they had made no attempt to express their grounds for opposing the application, and indeed had not indicated whether they opposed or supported the application.

143. When a person with third party rights of appeal appeals to the FHS AU, their *notice* of appeal must contain a concise and reasoned statement of their grounds of appeal and must be sent within 30 days of the date on which they were notified of NHS England's decision (**paragraph 30(1) and (5) of Schedule 2**).

144. If a person believes that they should have been given third party rights of appeal by NHS England that made the decision but were not, they may appeal to the FHSAU against NHS England determination not to give them rights. They must notify the FHSAU within 30 days of the date on which they were notified of NHS England's decision on the application but not given third party rights of appeal. Within that notification, they must give concise and reasoned statements as to their grounds of appeal against the decision not to give them third party rights of appeal as well as against NHS England's decision on the application (**paragraph 30(6) of Schedule 2**). If their appeal on the procedural point is successful, they will gain third party rights of appeal in relation to the decision to grant the application.

## Action to be taken by NHS England following notification of an appeal decision

145. Once the FHSAU has determined any appeal NHS England will be notified of the decision. This notification will also include a statement of the reasons for the decision and the findings of fact (**paragraph 10(1) of Schedule 3**).
146. For the purposes of the 2013 Regulations, the FHSAU's decision becomes NHS England's decision on the matter unless the FHSAU's decision is overruled by a court (**paragraph 11 of Schedule 3**).
147. If the FHSAU has granted or confirmed the grant of the *routine application*:
- NHS England must send the applicant a template *notice of commencement*, and
  - the six months within which to open take effect from the date the FHSAU makes its determination (**paragraph 10(2) of Schedule 3**).
148. If the FHSAU grants or confirms the grant of a *routine application* offering unforeseen benefits, NHS England must proceed as soon as is practicable to take such action under **regulation 50(4) or (5)** (postponement of the discontinuation of arrangements for the provision of *pharmaceutical services* by doctors) as it thinks fit, subject to any directions of the FHSAU given under **paragraph 9(2)(b) of Schedule 3**.

## Conditional grant of applications where the address of the premises is unknown

149. As covered above, applicants may not always be able to identify within their *routine application* the full address of their proposed premises but will instead have given their *best estimate* as to where they will be. If the application is approved by NHS England or



on appeal by the FHSAU, it is a condition of the grant of their application that they notify NHS England of the full address within six months of the date:

- on which NHS England notifies them of its decision under **paragraph 28 of Schedule 2**; or
  - if NHS England's decision was appealed, the date when the FHSAU notified its decision to grant or confirm NHS England's decision to grant the application (**paragraph 31(2)(a) of Schedule 2**).
150. NHS England may not vary or remove this condition (**paragraph 31(5) of Schedule 2**) and if the applicant fails to comply with the condition, the grant of their application lapses (**paragraph 31(6) of Schedule 2**).
151. If the grant of the original *routine application* is subject to an appeal by a person with third party rights of appeal, then the six month period starts on the date on which the appeal is determined by the FHSAU (**paragraph 31(2)(b) of Schedule 2**).
152. Within 14 days of receiving the notification of the full address:
- NHS England must satisfy itself as to whether or not it is valid. In order to be valid NHS England must be satisfied that the premises fall within the original *best estimate* given by the applicant (**paragraph 31(3) of Schedule 2**);
  - NHS England must notify the applicant of whether or not it is satisfied that it is a valid notification;
  - if it is so satisfied, NHS England must notify the address to those persons notified of the decision to grant the application.
  - if NHS England is not satisfied then it must notify the applicant of its decisions and the reasons for them and explain how the applicant may exercise their rights of appeal under **paragraph 36(1)(b) of Schedule 2**.
153. The only question therefore that NHS England is to consider at this point is whether the actual address is within the range of locations covered by the *best estimate*. NHS England does not need to re-open the question of whether or not the reasons it originally gave for granting the application are still valid.
154. There is no right of appeal for third parties against NHS England's decision that the address is in fact within the *best estimate*. The only recourse for a third party who disagrees with NHS England's decision is via judicial review.

## Changes to the premises specified in an application after its grant but before the listing of the premises

155. Following the grant of a *routine application* which gave a specific address of where the premises would be there may be occasions when the applicant is unable to open at that address. **Paragraph 32 of Schedule 2** makes provision for the applicant to change the address at which they intend to open.
156. Where an applicant wishes to change the premises at which they are to open, they are required to notify NHS England of the new address within:
- four months of the date on which they were sent *notice* of approval of the application; or
  - if the grant of the application was appealed to the FHSAU by a person with third party rights of appeal, four months of the date on which the appeal was determined (**paragraph 32(2) of Schedule 2**).
157. In order for the notification to be valid, NHS England must be satisfied that there is good cause for the change and that the new address would neither:
- result in significant change to the arrangements that are in place for the provision of LPS or of *pharmaceutical services* (other than those provided by a person on the dispensing doctor list for the relevant HWB area) in any part of its area or in a *controlled locality* of a neighbouring HWB area where that *controlled locality* is within 1.6 km of the new address; nor
  - cause significant detriment to the proper planning of the provision of *pharmaceutical services* in the relevant area (**paragraph 32(3) of Schedule 2**).
158. If NHS England receives a notification of a new address then it must, within 14 days of receiving it:
- notify the applicant of whether or not it is satisfied that it is a valid notification, together with the reasons for its decision;
  - if NHS England is not satisfied that it is a valid notification, it must include with that notification the reasons for its decision and an explanation of how the applicant may exercise their rights of appeal under **paragraph 36(1)(b) of Schedule 2**.
  - if it is satisfied that it is a valid notification, notify the new address to the persons notified of the decision to grant the application and include within that notification the reasons for its decision, and if the person has a right of appeal under **paragraph 32(5) of Schedule 2** an explanation of how that right of appeal may be exercised (**paragraph 32(4) of Schedule 2**).

159. A person, other than the applicant, will have third party rights of appeal in relation to a **paragraph 32** notification if:
- their application was originally considered together with this application under **paragraph 28(5) of Schedule 2**; or
  - they were notified of the decision on the original application either by NHS England because they were included in a pharmaceutical list; or
  - they were entitled to be included in a list because of the grant of a *routine* or *excepted application* but are not yet included and their interests NHS England believes would be significantly affected.
160. Such a person may appeal against NHS England's decision to amend the premises listed in the original application as long as they send a valid notice of appeal to the FHSAU within 30 days of the date on which they are notified of the change in premises (**paragraph 32(5) of Schedule 2**). The notice must include a concise and reasoned statement of the grounds of the appeal (**paragraph 32(6) of Schedule 2**).

## Taking effect of listing decisions: general

161. If the *routine application* is granted, then the applicant is required to submit a valid *notice of commencement* informing NHS England that they will commence the provision of services in the next 14 days (**paragraph 34(2) of Schedule 2**). NHS England would then include the applicant in a pharmaceutical list with effect from the date on the *notice of commencement*. If the date that the applicant intends to commence service provision is a public or bank holiday then NHS England may include the applicant and the premises in its pharmaceutical list although the applicant is not obliged to open on such a day.
162. In order to be in the correct form, the *notice of commencement* must:
- include the information required under **paragraph 29 of Schedule 2**; and
  - be in the same format as the version sent to the applicant by NHS England with its decision letter (**paragraph 34(3) of Schedule 2**)
163. Where the applicant undertakes to commence the provision of services within a period of less than six months and prior to the determination of the application that undertaking was not withdrawn, the *notice of commencement* must be sent within that period otherwise it will be invalid (**paragraph 34(4)(a) of Schedule 2**). If the applicant fails to submit their *notice of commencement* within this shorter timescale, the grant of the application lapses.

164. For all other applications, the *notice of commencement* must be sent within six months of the dates shown in the following table (**paragraph 34(4)(b) of Schedule 2**).

Scenario	Date on which the six month period starts
Application granted by NHS England.	Date on which the applicant is sent notice of NHS England's decision to approve under <b>paragraph 28 of Schedule 2</b> .
Refusal of the application was successfully appealed by the applicant	Date on which the FHSU determines the appeal.
In the course of granting the application a decision was taken to impose a condition in accordance with <b>Regulation 35</b> (conditional inclusion on fitness to practise grounds) and that condition is successfully appealed by the applicant, and the applicant chooses to open pending the outcome of the appeal.	If at the time the FTT determines the appeal the applicant is not included in a pharmaceutical list and the FTT confirms NHS England's decision or imposes a different condition, the applicant must within 30 days of being notified of the FTT's decision, notify NHS England as to whether or not it wishes to withdraw the application. If the applicant notifies that they do not wish to withdraw the application the six months starts at the date of NHS England's decision.
The application was granted subject to a condition imposed by virtue of <b>paragraph 31 of Schedule 2</b> (conditional grant where the full address of the premises was unknown).	The date on which the applicant subsequently validly notifies NHS England of the address of the premises.
The application was granted subject to a condition imposed by virtue of <b>paragraph 31 of Schedule 2</b> (conditional grant where the full address of the premises was unknown) and the applicant successfully appealed against NHS England's decision that the notification of the full address was invalid.	The date on which the appeal is determined.
The application was granted subject to a condition imposed by virtue of <b>paragraph 31 of Schedule 2</b> (conditional grant where the full address of the premises was unknown) and the applicant unsuccessfully appealed against NHS England's decision that the notification of the full address was invalid.	Date on which the applicant is sent notice of NHS England's decision to approve under <b>paragraph 28 of Schedule 2</b> or the FHSU determined any appeal in relation to the original decision on the application. The unsuccessful appeal does not extend the window period for opening.

The applicant successfully notifies a new address under <b>paragraph 32 of Schedule 2</b> .	The date of the decision to amend the premises.
The applicant notifies of a new address under <b>paragraph 32 of Schedule 2</b> , NHS England does not accept it as a valid notification and the applicant successfully appeals.	The date on which the appeal is determined.
The applicant notifies of a new address under <b>paragraph 32 of Schedule 2</b> , NHS England does not accept it as a valid notification and the applicant unsuccessfully appeals.	Date on which the applicant is sent notice of NHS England's decision to approve under <b>paragraph 28 of Schedule 2</b> , or the FHSAU determined any appeal in relation to the original decision on the application. The unsuccessful appeal does not extend the window period for opening.
The applicant successfully notifies of a new address under <b>paragraph 32 of Schedule 2</b> but a third party appeals against NHS England's decision.	The FHSAU sets the date by which the <i>notice of commencement</i> must be sent.

165. If the applicant fails to submit their *notice of commencement* within the correct timescale, then the grant of that application lapses (**paragraph 34(4) of Schedule 2**).
166. During the six month period following grant of the *routine application*, NHS England may approve a longer period not exceeding a further three months where it has good cause (**paragraph 34(4)(c)(i) of Schedule 2**). Should the applicant fail to submit their *notice of commencement* within that extended period, the grant of that application lapses (**paragraph 34(4) of Schedule 2**).
167. What is good cause will depend on the facts. For example if the applicant has been unable to complete the fit-out of the premises it may be deemed good cause to allow them a further month in which to do so. However if the applicant had made no attempt to start the fit-out then NHS England is unlikely to deem this good cause.
168. Under **paragraph 34(4)(c)(ii) of Schedule 2** the FHSAU may allow a longer period of time if:
- the grant is appealed by a person with third party appeal rights;
  - a decision to accept a notification of new premises under **paragraph 32 of Schedule 2** is appealed by a third party;
  - the applicant successfully appeals a notice to commence service provision made under **paragraph 35 of Schedule 2**; or

- the applicant successfully appeals against NHS England’s decision not to allow a longer period under **paragraph 34(4)(c)(i) of Schedule 2**.
169. Should the applicant fail to submit their *notice of commencement* within that extended period, then the grant of that *routine application* lapses (**paragraph 34(4) of Schedule 2**).
170. Where NHS England approves a *routine application* and issues a *notice of commencement* and the FHS AU then receives a valid notice of appeal from a person with third party appeal rights relating to the grant, the *notice of commencement* shall cease to have effect (**paragraph 34(5)(a) of Schedule 2**).
171. Similarly, where NHS England accepts a notification of new premises under **paragraph 32 of Schedule 2** and the FHS AU then receives a valid notice of appeal from a third party relating to that decision, the *notice of commencement* shall cease to have effect (**paragraph 34(5)(b) of Schedule 2**).
172. If, on appeal, the FHS AU grants or confirms the grant of the *routine application* for an extension of the time period within which to open, then NHS England is required to send to the applicant another template of the *notice of commencement* (**paragraph 10(2)(a) of Schedule 3**).

### Example

NHS England approves a *routine application* offering unforeseen benefits. It issues its decision and template *notice of commencement* to the applicant. It issues its decision to interested parties as required by **paragraph 28 of Schedule 2**.

An appeal against NHS England’s decision is subsequently made to the FHS AU by a person with third party appeal rights. The template *notice of commencement* sent by NHS England ceases to have effect.

The FHS AU considers the appeal and dismisses it and NHS England sends a second template *notice of commencement* giving the applicant six months from the date of the FHS AU’s determination within which to open.

## Notice requiring the commencement of pharmaceutical services

173. Following the approval of a *routine application*, **paragraph 35(1) of Schedule 2** allows NHS England to give notice to the applicant to commence the provision of

*pharmaceutical services*. This is a reserve power that should only be used in exceptional circumstances, and there are two exceptions to this. Firstly, the grant cannot have lapsed, and secondly it is not under appeal to the FHSAU or FTT.

174. If NHS England gives *notice* that service provision is to commence, but afterwards a valid *notice* of appeal is given against the grant then NHS England's *notice* lapses (**paragraph 35(2) of Schedule 2**).
175. When giving *notice* NHS England cannot require service provision to commence within the next 30 days, a longer period of notice must be given. Nor can NHS England require service provision to commence later than nine months after the date on which the applicant was notified that their application had been approved, assuming that a three month extension had been given (**paragraph 35(3) of Schedule 2**) i.e. once a grant has lapsed NHS England cannot require the applicant to provide services.
176. NHS England then includes the applicant on their pharmaceutical list on the date specified in the notice, unless the decision to give *notice* is appealed (**paragraph 35(4)(a) of Schedule 2**).
177. If the *notice* is appealed then the applicant is included in a pharmaceutical list as follows:
- if the appeal is discontinued, 30 days after the applicant discontinues the appeal;
  - if the appeal is unsuccessful, 30 days after the appeal is determined; or
  - the specified date,

whichever is the latest (**paragraph 35(4)(b) of Schedule 2**).