



Department  
of Health

# The performers lists and suspension

Consultation response 11 February 2015

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# The performers lists and suspension

Consultation response 11 February 2015

**Prepared by Professional Standards Branch, Strategy and External Relations,  
Department of Health**

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# Executive summary

In England, the performers lists framework requires NHS England to maintain the performers lists and gives it powers to admit, suspend or remove GPs, dentists and ophthalmic practitioners from its lists. These practitioners must be on a performers list managed by NHS England in order to provide NHS primary care services. In this way, NHS England can assure itself of the suitability of all general practice doctors, dentists, optometrists and ophthalmic medical practitioners who undertake NHS primary care services. Patients and public have an extra reassurance that these NHS practitioners are suitably qualified, have up to date training, have appropriate English language skills and have passed the relevant checks with the Disclosure and Barring Service and the NHS Litigation Authority. The legislative framework in England is set out in the National Health Service (Performers Lists) Regulations 2013<sup>1</sup>.

In April 2013, much of the Health and Social Care Act 2012 came into force. The changes to the health service included the abolition of Primary Care Trusts (PCTs), which had been responsible for the management of the performers lists. The 2013 Regulations were primarily made to reflect this change. From April 2013, the responsibility for the management of the lists transferred to NHS England. The Regulations came into force on 1 April 2013, replacing the National Health Service (Performers Lists) Regulations 2004<sup>2</sup>.

The 2013 Regulations require NHS England to remove practitioners from a performers list where they have been suspended by their regulator. This includes where the practitioner is subject to an interim suspension order pending an investigation. The 2004 Regulations did not require PCTs to take any action where a practitioner was the subject of an interim suspension order.

The professional regulators may make interim orders for suspension where a concern has been raised about a professional. These suspension orders are designed as short-term measures to protect members of the public, patients, the practitioner and the service in general while the facts around an issue are investigated. Interim orders panels, or other committees who make interim orders, do not make findings of fact and their orders are not intended to punish.

The Department of Health reviewed the 2013 Regulations and considered the impact of this change was disproportionate and, as the imposition of an interim suspension order is a neutral act (ie it is not intended to punish), this should not result in removal from the performers lists. The Department discussed this with NHS England, which agreed an amendment should be made to the 2013 Regulations so a practitioner is not removed from the performers list when subject to an interim suspension order by their regulator. In addition, the Department considered

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<sup>1</sup> The National Archives. [The National Health Service \(Performers Lists\) \(England\) Regulations 2013](#) (viewed on 16 January 2016)

<sup>2</sup> The National Archives. [The National Health Service \(Performers Lists\) Regulations 2004](#) (viewed on 16 January 2016)

that where practitioners have been suspended under an interim suspension order by their professional regulator, automatic suspension from the performers lists would be a more proportionate response.

Between 31 July 2014 and 25 September 2014 the Department consulted about draft amendment regulations<sup>3</sup>. It put forward two options to amend the 2013 Regulations. The first option was to revert to the position on interim suspension orders under the 2004 Regulations; and the second option was to automatically suspend a practitioner from a performers list under the 2013 Regulations. In addition, the draft included an amendment to provide that a person applying for inclusion in a performers list need not disclose a protected caution or protected conviction. This change was made as a consequence of amendments made to the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 following a Court of Appeal judgment in 2013<sup>4</sup>.

The consultation invited respondents to consider six questions. Two were in relation to the two options set out above. One question asked respondents to consider any equalities issues that could result from implementing the proposals. One question asked respondents about any costs, or administrative burdens that had not been considered; one question asked respondents about any benefits not already discussed; and one final question sought comments on the Amendment Regulations themselves.

The Department received 53 responses to the consultation. None of the respondents thought the current position where NHS England must remove a practitioner from the performers list, when they are subject to an interim suspension order by their regulator, should continue. The majority (59%) supported the second option of automatic suspension. However, there was some opposition on the grounds:

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

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<sup>3</sup> The Department of Health. [NHS performers list: changes to suspension regulations](#) (viewed on 16 January 2015)

<sup>4</sup> A protected caution or protected conviction is one which is not 'listed' and, in respect of a person who was under 18 years at the date of the caution or conviction two years have passed from the date of the caution or five years and six months have passed in the case of a conviction. Where the person concerned was 18 years or above at the date of the caution or conviction, six years have passed from the date of the caution or 11 years have passed in the case of a conviction. In addition, a conviction will be protected only if no custodial sentence was imposed and only if the person has no other convictions. (see article 2A of the Rehabilitation of Offender Act 1974 (Exceptions) Order 1975 (S.I. 1975/1023)): The National Archives. [The Rehabilitation of Offenders Act 1974 \(Exceptions\) Order 1975 \(Amendment\) \(England and Wales\) Order 2013](#) (viewed on 16 January 2015).

This document provides a summary of those responses. It also addresses the concerns respondents raised.

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

The Government intends to lay The National Health Service (Performers Lists) (England) (Amendment) Regulations 2015 before Parliament in early 2015 with the intention of them coming into force as soon as the parliamentary timetable allows.

# Background

## Function of the performers lists

- 1.1 In order to provide NHS primary care services in England GPs, dentists and ophthalmic practitioners must be on a performers list managed by NHS England. The National Health Service (Performers Lists) (England) Regulations 2013 (“the 2013 Regulations”) set out the procedures to manage the admission to the lists, and also mechanisms to impose conditions, suspend and remove practitioners from the list. They also set out appeal procedures.
- 1.2 The performers list system is intended to provide an extra reassurance for the public that GPs, dentists and opticians who practise in the NHS are suitably qualified, have up to date training, have appropriate English language skills and have passed other relevant checks such as with the Disclosure and Barring Service and the NHS Litigation Authority. It does this by giving NHS England powers over admission, suspension and removal from its lists and the maintenance of the performers lists.
- 1.3 Although NHS England has no employment relationship with these practitioners, it does have contractual relationships with the practitioners who are providing NHS primary care services. The performers lists are an important mechanism for NHS England in this respect, assuring it that the services it is commissioning are safe. The lists also support NHS England in its compliance with its duty to seek continuous improvement in the quality of health services (see Section 13E of the Health and Social Care Act 2012<sup>5</sup>).

## The Health and Social Care Act 2012

- 1.4 In October 2012, the Department of Health conducted a consultation on the changes to the performers lists<sup>6</sup>. This set out the changes needed due to measures introduced by the Health and Social Care 2012 Act, primarily the transfer of the performers lists to NHS England and establishment of national lists. A number of additional changes were considered. These came from the report of the 2009 Tackling Concerns Locally review of the performers lists<sup>7</sup> and also the 2010 report of the GP out-of-hours services review<sup>8</sup>.

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<sup>5</sup> The National Archives. [Health and Social Care Act 2012](#) (viewed on 16 January 2015).

<sup>6</sup> The Department of Health. [Performers Lists Regulations 2013](#) (viewed on 16 January 2015).

<sup>7</sup> The Department of Health / National Archives. [Tackling Concerns Locally: Performers List Sub-group](#) (viewed on 16 January 2015).

<sup>8</sup> The Department of Health / National Archives. [General practice out-of-hours services: project to consider and assess current arrangements](#). (viewed on 16 January 2015).



- 1.5 The Department published its response to the above consultation in February 2013 accompanied by a copy of the draft 2013 Regulations. The 2013 Regulations came into force on 1 April 2013, replacing the National Health Service (Performers Lists) Regulations 2004 (SI 2004 No.585) (“the 2004 Regulations”).
- 1.6 In April 2013, much of the Health and Social Care Act 2012 came into force. Included within the changes to the health service was the abolition of Primary Care Trusts (PCTs). PCTs had been responsible for the management of the performers lists under the 2004 Regulations. From April 2013, the responsibility for the management of the lists transferred to NHS England. In practice, the responsibility for the day-to-day management of the national lists rests with NHS England’s 27 Area Teams.

## The issue arising out of the 2013 Regulations

- 1.7 The 2013 Regulations require NHS England to remove practitioners from a performers list where they have been suspended by their professional regulator. This includes where the performer is the subject of an interim order for suspension. Under the 2004 Regulations, PCTs were not required to take any action where a performer was made the subject of an interim order for suspension.
- 1.8 Interim suspension orders are designed as short-term measures to protect members of the public, patients, the practitioner and the service in general while the facts around an issue are investigated. Interim orders panels do not make findings of fact and their orders are not intended to punish. Thus, where NHS England is required to remove a performer subject to an interim suspension order from its list, this appears to be at odds with the intention behind such an order. By removing a practitioner from the list, NHS England is, in effect, imposing a sanction. This is punitive, requiring the practitioner to reapply for inclusion when the interim suspension order ends.
- 1.9 By virtue of a Determination made under the 2004 Regulations<sup>9</sup>, where a practitioner was suspended from the performers list (but was not subject to a final suspension order by the regulator) the PCT had discretion to make payments to that practitioner. Under the 2013 Regulations, because automatic removal of the practitioner from the performers list when subject to an interim suspension order also removes NHS England’s discretion to suspend, such practitioners are not eligible for payments under the Determination.
- 1.10 The Department of Health has reviewed the 2013 Regulations and considers their impact is disproportionate. Because the imposition of an interim suspension order is intended to be a neutral act, this should not result in removal from the performers lists. The

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<sup>9</sup> The Department of Health. [Payments to GPs and dentists suspended from the Performers List](#) (viewed on 16 January 2015).

Department has discussed this with NHS England, which agrees the 2013 Regulations should be amended to remove the requirement to remove a practitioner from the performers list when an interim suspension order is in place and favours reverting to the position under the 2004 Regulations.

- 1.11 Maintaining the current position, where NHS England is required to remove practitioners from a performers list when subject to an interim suspension order by the regulator, is likely to be problematic. There is a greater risk of litigation as the removal is automatic. It does not give the practitioner the right to make representations, or NHS England to consider the facts before making a final decision. We think this would be unfair and we consider removal from the performers lists is a disproportionate response in the circumstances.
- 1.12 There is no impact on patient safety, because the practitioner is not permitted to practise when suspended by a regulator. However, practitioners who have been removed from the performers list as a result of an interim suspension order would have to reapply to join the list, which would cause a delay to their returning to practise following a suspension ceasing.
- 1.13 Determinations made by the Secretary of State under the 2013 Regulations set out the circumstances where NHS England may make payments to practitioners suspended from a performers lists. Maintaining the current position also precludes such payments being made to practitioners who are subject to an interim suspension order, because the practitioner will have to be removed from the performers lists.
- 1.14 Maintaining this position is not feasible or desirable.

# Consultation process

## Consultation proposals

- 2.1 In order to address this issue, the Department consulted about two options to amend the 2013 Regulations. The first option was to revert to the position on suspension under the 2004 Regulations; and the second option was to automatically suspend practitioners from the performers list where they are subject to an interim suspension order.

### Option one: revert to the position under the 2004 Regulations

- 2.2 The 2004 Regulations required PCTs to remove practitioners from a performers list where they were suspended by a regulator following a finding of impairment of fitness to practise by the General Medical Council, the General Dental Council, or the General Optical Council. These suspensions are made after a full investigation and finding of fact that justifies a severe penalty.

- 2.3 Conversely, the 2004 Regulations did not require any specific action in a case where a practitioner had become subject to an interim order for suspension. PCTs had discretion to remove a practitioner in certain circumstances or to suspend a practitioner from the list. They would be in the best position to assess whether any action would be required. The practitioner would be prevented from practising by virtue of the regulator's suspension, so there would be no risk to patient safety whilst this was in place. Under the 2004 Regulations a PCT could decide to suspend a practitioner, impose conditions or remove, or alternatively, simply wait for the outcome of the regulator's investigation.

- 2.4 This option enables NHS England to consider the facts and circumstances before making a decision about a practitioner's fitness for purpose (ie whether the practitioner is capable of performing competently in the specific role with regards the employers' additional requirements). At the same time, the regulator will be considering whether to take action on their fitness to practise (ie whether, among other things, the practitioner meets the standards of competence, care and conduct expected of their profession). This would reduce the risk of practitioners being removed from the performers list before their case had been fully considered by the regulator and reduce any consequent risk of litigation. It provides NHS England with the discretion to take such action as it considers appropriate in each case. If NHS England decides to suspend a practitioner, those who are could continue to be paid under the Determination, which the Department will amend to enable this.

### Option two: automatically suspend from the performers list

- 2.5 This option seeks to amend the 2013 Regulations to require NHS England to suspend practitioners from the performers lists, where they become the subject of an interim order for suspension by their regulator. As noted in option one, the practitioner would be prevented from practising by virtue of the regulator's interim order for suspension, so there would be no risk to will be no impact on patient safety whilst this was in place. However, the Department believes suspension from the performers list in a case where

an interim suspension order is in place is more aligned to the decision made by an interim orders panels, providing consistency between the regulator and NHS England, until the regulator makes a full judgement. Either the practitioner's suspension can be lifted, or they will be removed from the performers list accordingly. This option would also ensure that all practitioners who are eligible could be paid under the Determination while they were the subject of an interim order for suspension. We intend to amend the Determinations to enable this.

## Methodology

- 2.6 The Department consulted on an England only basis, because the regulations we are seeking to amend only apply to England. The consultation opened on 31 July 2014 and ran for eight weeks, closing on 25 September 2014. It followed the Government Code of Practice.
- 2.7 The consultation sought views on the provisions in the draft amendment regulations which set out:
- the option that if a medical, dental, or ophthalmic performer were the subject of an interim suspension order, NHS England would not have to remove the practitioner from the performers list (Regulations 9, 10 and 12); and
  - the option for automatic suspension (Regulations 5 and 6).
- 2.8 There is also an amendment to provide that a person applying for inclusion in a performers list need not disclose a protected caution or protected conviction. This was not consulted on as the change is necessary as a consequence of amendments made to the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975, following a Court of Appeal judgment in 2013<sup>10</sup>.
- 2.9 The consultation invited respondents to consider six questions. Two were in relation to the two options set out above and explained in more detail in paragraphs 2.2 to 2.5. One question asked respondents to consider any equalities issues that could result from implementing the proposals. One question asked respondents about any costs, or administrative burdens that had not been considered; one question asked respondents about any benefits not already discussed; and one final question sought comments on the Amendment Regulations themselves.

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<sup>10</sup> The Courts and Tribunals Judiciary. [R \(on the application of\) T -v- Chief Constable of Greater Manchester and others](#) (viewed on 16 January 2015).

2.10 The Department received 53 responses, with respondents identifying themselves as follows:

**Table 1: Details of consultation respondents**

<b>Category</b>	<b>Number of respondents</b>	<b>Percentage</b>
A member of the public	2	4%
A health or social care professional	23	43%
On behalf of an organisation	27	51%
Not answered	1	2%
<b>Total</b>	<b>53</b>	

It should be noted that not all respondents answered all the questions.

2.11 The Department would like to thank all of those who responded to this consultation and express its gratitude for their input.

## Consultation responses

- 3.1 No respondent thought the current position, where NHS England must remove a practitioner from the performers list, when they are subject to an interim suspension order by their regulator, should continue. Below is a summary of the responses to each of the six questions.

**Question 1: Do you agree the 2013 Regulations should be amended so that NHS England is not required to remove practitioners from the performers list, who are subject to suspension by an interim order?**

**Table 2: Detail of responses to option one - reverting to the position under the 2004 Regulations**

Option	Total	Percentage
Agree	43	81%
Disagree	5	9%
Unsure	1	2%
Not Answered	4	8%

- 3.2 Over 81% agreed with the statement in question one. Generally, those in agreement believed that as suspension from the list should be a neutral act the proposed amendment to the Regulations was fair. Some felt that removing a practitioner from the performers list removed their ability to earn any income, which would be a severe measure for someone who could be cleared of the reason for the suspension. However, it should be noted that as they would be subject to an interim suspension order from the regulator, they could not practise in any case while this was in force.
- 3.3 All professional bodies agreed that option one was a fair way forward, because practitioners could experience problems in being re-instated onto the performers list. This was an opinion echoed by the NHS organisations. Some organisations queried who would pay salaries during the period of suspension. Only one NHS organisation disagreed with option one, as they felt that for NHS England to have discretion to decide whether the practitioner would be removed, suspended, or have conditions attached, could leave scope for inconsistency in how cases were managed in different teams. They felt this placed the practitioner in a vulnerable position, because if they were removed from the performers list they would be unable to receive any payment.
- 3.4 Some were concerned over the phrase 'could' continue to be paid, and believed practitioners should receive payment of salaries. This was because suspension is a neutral act and they thought for practitioners not to be paid could be subject to legal challenge. Representative bodies felt option one was fair and appropriate and believed no decision to remove should be made until all allegations had been properly investigated.

3.5 The Royal College of General Practitioners (RCGP) favoured option one over option two feeling that “the current situation is indefensible as it effectively punishes clinicians without any evidence of wrongdoing.” They felt there was “no justification for automatic suspension or removal from the performers list given that the interim suspension order applied by the health professionals’ regulatory body will remove the ability of the clinician to practise, thereby ensuring patient safety is protected without a need for a pre-emptive change in the status of the health practitioner.” However, they also said they would not support NHS England being given power to remove practitioners from the performers list without relevant changes to the legislation being made.

3.6 The General Medical Council (GMC) felt that implementing either option would suffice to address the issue. More specifically the GMC stated:

“We agree that the current requirement under the 2013 Regulations, which require a practitioner to be removed from a performers list, where an interim suspension order has been made against them by their professional regulator, is disproportionate. An interim suspension order imposed by a MPTS Fitness to Practise or Interim Order’s Panel is an interim measure, which is intended to address risk and does not involve findings being made against the practitioner.

“Further, the interim suspension will not necessarily result in fitness to practise action being taken against the practitioner. It would therefore seem inappropriate, absent other factors, for such a temporary measure to result in a practitioner being removed from the performers list and for the practitioner to be required to reapply for inclusion, for example where an interim order is later revoked and a matter is closed with no action.

“We consider that either of the options proposed, both of which remove the ‘automatic’ removal requirement, would address this issue adequately.”

**Question 2: Do you agree the 2013 Regulations should be amended so that NHS England automatically suspends practitioners who are subject to an interim suspension order?**

**Table 3: Detail of responses to option two - automatic suspension**

Option	Total	Percentage
Agree	31	58%
Disagree	11	21%
Unsure	7	13%
Not Answered	4	8%

3.7 The majority of respondents agreed with option two. The General Dental Council believed it would be preferable:

“as it would provide a level of consistency and certainty for performers across the NHS, which might not occur if it was decided to revert to the discretionary model of the 2004 Regulations. It would also be particularly helpful in facilitating a more joined up approach to managing performer concerns between regulators and NHS England”.

- 3.8 The Medical Defence Union (MDU) preferred option two as it offered a greater guarantee of continued payment for practitioners who are the subject of an interim suspension order. The British Medical Association (BMA) strongly supported option two as:
- “the imposition of an interim suspension order on a general practitioner is a neutral act and not intended to punish – this is a position that we strongly support. The current automatic removal from the performers list is disproportionate and unfair. The impact of a GP being removed from the performers list after an interim suspension order can be devastating. We fully agree that NHS England should consider the full judgement in a fitness to practise case, before fully reinstating or removing a practitioner from the performers list accordingly.”
- 3.9 The British Dental Association supported option two on the basis that a suspension from the performers lists will have a date attached to it in relation to the end of the interim order, which it will under the proposed Amendment Regulation 5(a)(1B). It also queried whether the decision of immediate suspension would still lead to the full review within two days and the invitation to an oral hearing under Regulations 12(7)b) and 12(7)c). Under these Regulations, NHS England is required to review its decision to suspend within two working days of the suspension and as soon as is practicable give the practitioner the opportunity to put their case at an oral hearing. The British Dental Association felt such cases could be handled through a more automatic procedure on the basis of the regulator’s interim order suspension.
- 3.10 The procedure in relation to suspension from a performers list only as a result of the regulator’s interim suspension order is self-contained in the new Regulations 12(1A), 12(1B) and 12(1C). Further amendments to regulation 12 will mean the notice provisions, review of the suspension and the right to an oral hearing apply only to suspensions under Regulation 12(1) and not under the proposed Regulation 12(1A) (automatic suspension following the imposition of an interim suspension order).
- 3.11 As noted above, the RCGP favoured option one, but did not support NHS England being given the power to remove medical practitioners from the performers list in advance of a decision being made by their regulatory body. Therefore, it would not support this option without relevant changes to the legislation. The amendments we are proposing will end automatic removal from the performers lists under both options and under option two will replace this with automatic suspension at the point when a regulatory body issues an interim suspension order.
- 3.12 In general, there was support for option two on the grounds:
- it ensures a more consistent approach between the regulator and NHS England, compared to the 2004 Performers List Regulations;
  - it is a fairer system, avoiding the possibility of local bias and favouritism; and
  - it ensures practitioners have access to payments.



- 3.13 Some organisations were unsure about option two. The National Association of Sessional GPs was concerned there may be cases where suspension by NHS England may not be required. Also, there could be unnecessary delay to reinstate the practitioner where suspension had been lifted by the regulatory body. However, it thought it helpful to align registration with the regulatory body and membership of the performers list. Being on one but not the other could undermine public confidence.
- 3.14 The theme of delays to reinstatement was common among those who were uncertain. However, as mentioned above, under the proposed amendment to the regulations, the suspension would cease when the regulator's interim suspension order ends.
- 3.15 Others were unsure, because they didn't think option two added anything to patient safety. One respondent thought the choice of option one or option two inconsequential given NHS England will have acted on the regulator's suspension. However, option two appeared the soundest, ensuring consistency of approach and avoiding discretionary decision making which may be open to challenge of discrimination.
- 3.16 There was opposition to option two on the following grounds:
- several respondents believed the amendment to be irrelevant as suspension by the Interim Orders Panel would stop the practitioner working, which would help to ensure patient safety (as mentioned above);
  - there was concern extra administrative costs could be incurred to support the Performers List Decision Panels (PLDP);
  - some were also of the opinion that the PLDP should have the option to remove the practitioner from the performers list, if they considered the circumstances of the suspension required it;
  - some respondents queried who would meet extra costs of suspension payments and a minority thought payment of salaries should be made by the regulatory body, as they make the suspension, rather than NHS England;
  - one respondent pointed out that NHS England and regulatory body processes are independent of each other. NHS England may already have investigated and assessed a case by the time an Interim Order Panel takes place. An automatic suspension from the performers list would mean the practitioner had to be paid, when NHS England may have already reached a decision about the case and was no longer in a neutral position; and
  - among those who opposed option two, there was general opinion that NHS England should be able to make an independent decision about whether to suspend or

remove a practitioner from the performers list. There could be valid reasons why removal was appropriate.

- 3.17 For the options stage impact assessment, NHS England gathered information from its area teams and the National Clinical Assessment Service (NCAS) about the number of suspensions per year from the Performers Lists. From this it was estimated that the average number of suspensions by NHS England per year was around 67. Of these, only two per year were interim suspensions by the regulator first. On this basis, we are confident the additional cost in terms of salary would be negligible.
- 3.18 According to the guidance issued by NHS England<sup>11</sup> the PLDP is required to meet monthly. Given the estimated number of additional cases would be two, we believe the extra administrative costs would also be negligible.
- 3.19 Our proposed amendments require NHS England to suspend a practitioner automatically when the regulator imposes an interim suspension order. The existing power for NHS England to remove a practitioner from a list is unaffected by these proposals. NHS England will still have the option of removing the practitioner from the performers list under Regulation 14, should the circumstances require it.
- 3.20 NHS England opposed option two because:
- it would restrict NHS England’s discretion to take action under its own procedures and processes to manage performance concerns and unhelpfully bind together the responsibilities of the regulator with those of NHS England;
  - there will be no improvement to patient safety as a result of this measure which then becomes a bureaucratic response requiring NHS England to make payments to practitioners who have been suspended by a third party outside of NHS England’s control;
  - it unhelpfully blurs the distinction between fitness for purpose and fitness to practise. The threshold for intervention for managing practitioner concerns under the performers list regulations is set at the level of ‘fitness for purpose’ (ie whether the practitioner is capable of performing competently in their specific role with regards to the additional requirements over and above fitness to practice). Option two would restrict NHS England’s discretion to act where it felt the evidence before it was sufficiently serious to warrant removal from the performers list rather than suspension; and

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<sup>11</sup> NHS England. [Policy and standard operating procedure for governing the inclusion, movement and maintenance of medical, dental and ophthalmic performers in NHS England’s national primary care performers lists](#) (viewed on 16 January 2015).

- because of the increasing numbers of complaints being referred to the professional regulators, NHS England is concerned there will be increasing delays for cases being heard at the fitness to practise stage of proceedings. The proposed amendments to the regulations would require NHS England to make payments to practitioners subject to an interim order for suspension whilst restricting NHS England's ability to conclude a hearing where a removal from the performers list is being contemplated.

3.21 The Optical Confederation expressed a preference for option one for the following reasons:

- it would allow NHS England discretion to consider the facts available and make its own decisions, which included the option not to take any action at all. It could consider each case individually and still suspend a practitioner at this interim stage, without it being a mandatory requirement;
- moreover practitioners should not be subject to automatic interim suspension orders by their Regulator. Every suspension is a serious comment made against that individual even when it is designed not to be punitive - and each case should be investigated before a decision to suspend is taken;
- if a practitioner is suspended by the Regulator for a period greater than six months and NHS England wished to follow suit, it would need to make an application to the 1st tier tribunal, because under the NHS Regulations the suspension period can be no greater than six months;
- under option two, there is also an additional cost to NHS England, as any suspension will involve notification to the practitioner, who may exercise their right to make representations at an oral hearing;
- it is important to maintain NHS England's ability to act independently from the Regulator; such an approach would be consistent with the remainder of the Regulations; and
- there remains a lack of clarity as to the process that will occur if/when the regulator revokes an interim suspension order. It is an unfortunate reality that such processes often take longer than desired. There is a real risk that such an additional step will mean further delay before a practitioner can resume practising once the suspension has been removed.

3.22 The RCGP opposed option two, considering a return should be made to the situation whereby NHS England (previously PCTs) has the discretion to make decisions about whether to suspend a clinician who is under investigation on a case by case basis. NHS England would be able to assess each case on its merits, reducing the need for unnecessary suspension, and the associated administrative costs. Automatic suspension from the performers list creates an unnecessary double administrative burden. It also noted that the consultation listed option one as the lowest cost option.

- 3.23 While the Department understands these concerns, we believe option two is more proportionate, until a full judgment is made by the regulator. We agree there is a difference in role between the regulator ensuring ‘fitness to practise’ and NHS England ensuring ‘fitness for purpose’. However, it is not clear how, if a regulator has concerns about a practitioner’s fitness to practise, there would not be equal concern about the practitioner’s ability to perform in any role. As mentioned above, NHS England will still have flexibilities under Regulation 14 to remove a performer from the list. While suspended from the performers list due to an interim suspension order from their regulator (ie awaiting a judgement from the regulator), practitioners would still have access to payments thus removing the punitive aspect. We will amend the Determinations to enable this.
- 3.24 The proposals do not affect any action being taken by the regulatory bodies. Automatic suspension resulting from an interim suspension order by a regulator will not require NHS England to apply to the First-tier Tribunal. These existing provisions in the regulations do not touch on a suspension imposed under the proposed new Regulation 12(1A). As mentioned previously, the amendments we are proposing will mean the existing notice provisions and the right to an oral hearing will not apply where a performer is subject to an interim suspension order from their regulator. Automatic suspension will end when the interim order suspension ends. The difference in cost between option one and option two has been estimated to be £2k per annum.

**Question 3: Do you think there are any additional equality issues that need to be considered? If you agree, are you able to assist us in providing evidence?**

**Table 4: Detail of responses to question three – additional equality issues**

Option	Total	Percentage
Agree	4	8%
Disagree	24	45%
Unsure	15	28%
Not Answered	10	19%

- 3.25 Over 45% did not feel there would be any equality issues if the proposed changes are made, while a further 47% were unsure, or did not answer. There was agreement that a consistent and fair mechanism for payments to suspended performers was required. Other respondents felt there could be doctors who were International Medical Graduates, or from an ethnic minority, who were more likely to be investigated and suspended by the GMC than those who are not. However, it was felt the proposed changes seemed to be positive and could help the current situation.
- 3.26 One respondent commented that making it a requirement “does add equality to the process for practitioners in how their cases will be managed which should not be underestimated. Suspension from the performers list as a requirement promotes a clear

and fair approach to all practitioners removing the likelihood of local interpretation by area teams and varying outcomes for the practitioner.”

- 3.27 No other respondents identified any issues relating to any of the equality strands. Given the evidence, we believe there will only be a positive impact resulting from the amendments to the Regulations. There may be more benefit to those who are ill, particularly for those who come within the protected characteristics of disability and age. Access to payments and quicker return to work may be more beneficial to them. With regard to the requirement to pay due regard to the ‘family test’, we believe our policy will support the family, because the practitioner will continue to be paid, thus easing the pressure while they were are suspended awaiting the outcome of their Fitness to Practise case. The GMC has recently published their ‘Equality and Diversity Strategy 2014-17’<sup>12</sup>, which outlines the principles for identifying and taking action on relevant equality and diversity issues.

**Question 4: Do you have views or evidence as to the likely effect on costs or the administrative burden of the proposed changes?**

**Table 5: Detail of responses to question four – evidence of the likely effect on costs or the administrative burden of the proposed changes**

Option	Total	Percentage
Agree	23	43%
Disagree	11	21%
Unsure	8	15%
Not Answered	11	21%

- 3.28 Two issues were prominent in the responses to this question: the costs generated via a change to the administrative burden to the NHS; and the costs of paying a practitioner while they were suspended. Opinion was divided about the administrative burden, some saying the costs would be less as there could be no challenges to the decision to be managed. Conversely, there would be additional costs and time commitments for PLDP hearings. Some thought the benefits of the proposed options would outweigh the costs. However, no one was able to provide any solid evidence.
- 3.29 In terms of pay, NHS England highlighted the potential impact of the rising number of complaints being made to the professional regulators. The capacity to deal with complaints through the regulators was finite and a delay between the interim order hearing and the fitness to practise hearing stages would add a cost pressure to the NHS.

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<sup>12</sup> The General Medical Council. [Equality and diversity strategy 2014 -17](#) (viewed on 16 January 2015).

3.30 As outlined in the consultation, the evidence from NHS England showed that out of an average of 67 suspensions by it per year, only about two were interim suspensions initially by the regulatory body. Therefore, we are confident any additional costs generated by the implementation of option two (as compared to option one) will be minimal.

**Question 5: Do you think there are any benefits not already discussed relating to the proposed changes?**

**Table 6: Detail of responses to question five - benefits not already discussed**

Option	Total	Percentage
Agree	6	11%
Disagree	25	47%
Unsure	10	19%
Not Answered	12	23%

3.31 The majority did not think there were any additional benefits, or were uncertain and made no comments. Of the 11% who did, benefits mentioned were:

- area teams being in a position to take consistent action across England;
- the reputation of area teams may benefit and they would be seen as less harsh;
- reduction in bureaucracy, NHS England’s workload and related costs; and
- improvement in morale.

**Question 6: Do you have comments on the draft amendment regulations themselves?**

3.32 77% of respondents did not answer this question, or stated they had no further comments. No respondent had suggestions for changes to the draft amendment regulations.

3.33 One respondent suggested there should be time limits to suspensions when instigated by the regulator. There are in fact time limits to such suspensions ranging from 18 months for doctors to 12 months for dentists and opticians (Section 41a of the Medical Act 1983<sup>13</sup>, Section 32 of the Dentists Act 1984<sup>14</sup> and Section 15 of the Opticians Act 1989<sup>15</sup>). Therefore, this would also be the maximum period NHS England could suspend practitioners under option two.

<sup>13</sup> The National Archives. [Medical Act 1983, Section 41A](#) (viewed on 16 January 2015).

<sup>14</sup> The National Archives. [Dentists Act 1984, Section 32](#) (viewed on 16 January 2015).

<sup>15</sup> The National Archives. [Opticians Act 1989, Section 15](#) (viewed on 16 January 2015).

- 3.34 One respondent thought the regulations should mention occupational health clearance being a mandatory component of an application to a performers list. Application to the performers lists is not the subject of these amendment regulations and this is covered in guidance issued by NHS England in January 2014<sup>16</sup>.

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<sup>16</sup> NHS England. [Performers List Occupational Health Clearance](#) (viewed on 16 January 2015).

## Conclusion

- 4.1 After careful consideration of the responses, the Department believes the best option will be automatic suspension from a performers list where the practitioner is subject to an interim suspension order by the regulator (option two). This is because it provides the fairest, most proportionate and consistent approach in addressing issues of those practitioners who have been suspended by an interim suspension order by their regulator. Of the 53 responses we received, no one thought the current position (where NHS England must remove a practitioner from the performers list when they are subject to an interim suspension order by their regulator) should continue. The majority of respondents were in favour of option two.
- 4.2 Whilst we acknowledge the issues raised by individuals and organisations who disagreed with option two, we believe the concerns are unfounded. In relation to costs and additional bureaucracy, current data from NCAS and NHS England shows there are around 67 suspensions from the performers lists per annum. Of these, only two are also suspended by the regulator. Therefore, the difference in cost between implementing option one or option two is estimated to be negligible.
- 4.3 Although option two requires NHS England to suspend a practitioner automatically when the regulator imposes an interim suspension order, NHS England will still have the option of removing the practitioner from the performers list under the circumstances set out in Regulation 14. This should give NHS England sufficient flexibility, should the circumstances require it.
- 4.4 We agree there is a difference in role between the regulator ensuring 'fitness to practise' and NHS England ensuring 'fitness for purpose'. However, we believe that if a regulator has concerns about a practitioner's fitness to practise and issues an interim suspension order, then there should be equal concern about the practitioner's ability to perform in any role. Therefore, we do not see how under these circumstances there is any conflict.
- 4.5 In conclusion, the Government intends to lay The National Health Service (Performers Lists) (England) (Amendment) Regulations 2015 before Parliament in early 2015. The Regulations will include the requirement for NHS England to suspend practitioners from the performers list when the practitioner is subject to an interim suspension order from their regulator. It is intended the Regulations will come into force as soon as the parliamentary timetable allows.