EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE COMMISSIONING BOARD AND CLINICAL COMMISSIONING GROUPS (RESPONSIBILITIES AND STANDING RULES) (AMENDMENT) (No.2) REGULATIONS 2015

2015 No. 1430

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

2. Purpose of the instrument

2.1 The instrument amends the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 (SI 2012/2996) ("the 2012 Regulations"), which provide for a range of matters relating to the functioning and commissioning responsibilities of the National Health Service Commissioning Board (known as NHS England) and clinical commissioning groups (CCGs). The amendments:

- remove two standards relating to patients who have already started NHS treatment from the requirement on clinical commissioning groups and NHS England to meet the waiting times standards. The standard relating to patients waiting to start treatment remains in place;
- remove a related provision excluding a period of time from the calculation of how long a patient admitted as an inpatient waited to start treatment;
- update the reference to "The Referral to Treatment Consultant-led Waiting Times Rules Suite" to the October 2015 publication; and
- update the 2012 Regulations to reflect revised rates of NHS-funded Nursing Care payable by the relevant body (NHS England or CCGs);

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

3.1 None.

4. Legislative Context

4.1 Section 6E of the National Health Service Act 2006 was inserted by section 20 of the Health and Social Care Act 2012. It enables the Secretary of State to impose requirements by regulations on NHS England and CCGs when they are exercising their functions of commissioning health services. These requirements are known as the "Standing Rules" because they are intended to set core, ongoing requirements for the health service. The first set of Standing Rules was made as part of the 2012 Regulations.

4.2 Part 9 of the 2012 Regulations provides the right set out in the NHS Constitution for patients to access services within maximum waiting times, or for the commissioners to take all reasonable steps to offer a range of alternative providers if this is not possible. Regulation 45 imposes a duty on commissioners to make arrangements to ensure that treatment appropriate to the reason for an elective referral is provided within 18 weeks of receipt of notice of such a referral in a specified percentage of cases. Regulation 50 imposes a duty on commissioners to have regard to the Referral to Treatment Consultant-led Waiting times Rules Suite when carrying out their duties under regulation 45

4.3 Part 6 of the 2012 Regulations makes provision about NHS CHC and NHS-funded Nursing Care. Regulation 20 sets out the flat rate and high band payments payable in respect of NHS-funded Nursing Care. The amendments to Part 6 increase the rates payable for NHS-funded Nursing Care.

4.4 Under section 6E(9) of the 2006 Act, where regulations under section 6E are made to come into force on a day other than 1 April, the Secretary of State must publish a statement explaining the reasons for making the regulations so as to come into force on such a day, and lay the statement before Parliament. As these Regulations come into force on 1 October 2015, the Secretary of State has laid before Parliament and published a statement of explanation.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

Maximum Waiting Times (18 weeks)

7.1 Following clinical advice from the NHS Medical Director, Sir Bruce Keogh and conversations with Simon Stevens, the Chief Executive of the NHS England, the Secretary of State for Health accepted a number of recommendations to improve monitoring of performance against various waiting time standards (two – 18 weeks and cancer two week waits – are set out in these Regulations and others are pledges in the NHS Constitution, being measures required of providers outside legislation). These include removing the two Referral to Treatment (RTT) waiting time standards related to the completed pathways of patients who have started treatment, to focus solely on the standard for the incomplete pathways of patients waiting to start treatment. As the consultant-led Referral to Treatment waiting time standards are set out in regulation 45 of the 2012 Regulations, it is necessary to amend that

regulation to achieve this change.

7.2 Sir Bruce Keogh recommended this change because the current set of three standards can be confusing and give rise to perverse incentives to concentrate on patients recently added to the waiting list at the cost of those waiting longer. To meet the 90% admitted standard the NHS currently needs to treat nine short waiters for every one over 18 week waiter it treats, or be penalised by financial sanctions in the NHS Standard Contract. The change means a simplified, clearer focus on only one standard, looking at all patients waiting to start treatment. This should lead to fewer patients waiting inappropriately to start treatment longer than 18 weeks.

7.3 For consultant-led Referral to Treatment, the two standards relating to completed patient pathways set out in regulation 45(2) are therefore removed by these Regulations. The sole standard will be the incomplete pathway standard set out currently in regulation 45(3) but incorporated in a new regulation 45(1).

7.4 Regulation 45(5) which excludes a period of time from the calculation of how long a patient admitted as an in-patient waited to start treatment is also removed, as it is directly related to regulation 45(2).

7.5 Regulation 50, which imposes a duty to have regard to the Referral to Treatment Consultant-led Waiting times Rules Suite when carrying out its duties under regulation 45, is updated to refer to the October 2015 version of the Rules Suite.

7.6 These Regulations make no other changes to the duties which regulations 47 to 51 and regulation 54 of the 2012 Regulations place on commissioners. Removing two of the standards does not affect the duty to make provision for patients to start non-urgent consultant-led treatment within 18 weeks of referral or, where this is not possible, for the NHS to take all reasonable steps to offer the patient a quicker appointment at a range of alternative providers if the patient makes such a request.

NHS-funded Nursing Care

7.7 NHS-funded Nursing Care is the funding provided by the NHS to care homes providing nursing, to support the provision of nursing care by a registered nurse for those assessed as eligible. If an individual does not qualify for NHS Continuing Healthcare, the need for care from a registered nurse should be determined. If the individual has such a need and it is determined that the individual's overall needs would be most appropriately met in a care home providing nursing care, then this would consequently lead to eligibility for NHS-funded Nursing Care. Once the need for such care is agreed, the relevant body's responsibility to pay a flat rate contribution to the care home towards registered nursing care costs arises.

7.8 There are two rates of NHS-funded Nursing Care payable, the standard rate and the higher rate. The single band of NHS-funded nursing care was

introduced on 1 October 2007 and replaced the previous low, medium and high bands of nursing care. The single band is a contribution towards the cost of services provided by a registered nurse, involving either the provision of care or the planning, supervision or delegation of the provision of care, but it does not cover services which do not need to be provided or supervised by a registered nurse. All individuals newly eligible for NHS-funded nursing care since 1st October 2007 have been placed on the standard rate / single band. The NHS is responsible for this funding. Accommodation and social care costs are the responsibility of either the LA and/or the individual (subject to the outcome of a community care assessment and financial assessment). Individuals who were in receipt of the high band of NHS-funded nursing care under the three-band system that was in force until 30 September 2007 are entitled to continue on the high band until:

a) on review, it is determined that they no longer have any need for nursing care;
b) on review, it is determined that their needs have changed, so that under the previous three-band system, they would have moved onto the medium or low bands. In this situation, the individual should be moved onto the standard rate / single band;
c) they are no longer resident in a care home that provides nursing care;
d) they become eligible for NHS continuing healthcare; or
e) they die.

CCGs must continue to make NHS-funded nursing care contributions in respect of those individuals who were deemed eligible for this funding prior to 1st April 2013, until such time as any of the circumstances listed above apply.

7.9 The rates set out in the 2012 Regulations (as amended) are £110.89 per week for the flat rate payment and £152.61 per week for the high band payment. These Regulations increase the rates to £112.00 per week and £154.14 per week respectively. The Secretary of State has previously announced increases to the rates in the 2012 Regulations with effect from 1 April for the financial year 2015/16. In practice, health care bodies pay at the rates published by the Secretary of State. These Regulations provide the first opportunity to insert the published rates for 2015/16 in the 2012 Regulations.

Consolidation

7.10 None.

8. Consultation outcome

8.1 There is no statutory requirement to consult on these amendments.

8.2 There was no formal consultation on the amendment to the duty to meet the maximum waiting times standards. Following clinical advice from the NHS Medical Director, Sir Bruce Keogh and conversations with Simon Stevens, the Chief Executive of the NHS England, the Secretary of State for Health accepted a number of recommendations to improve monitoring of

performance against the waiting time standards set out in the NHS Constitution and in these regulations to focus on one standard and delete two related standards. This does not affect the duty on commissioners to make provision for patients to start non-urgent consultant-led treatment within 18 weeks of referral or offer alternative provision and hence does not affect the patient right. For providers, it lifts a regulatory burden and shifts focus on to the most useful standard.

8.3 There was no formal consultation on the amendment to the rates of NHS funded Nursing Care. The amendment follows routine consideration of the rates payable.

9. Guidance

9.1 Revised guidance for commissioners on the implementation of the right to access services within maximum waiting times will be issued by NHS England to coincide with these amendments coming into force. Separate guidance will be issued on consequent changes to the Referral to Treatment statistics collection, and the NHS Standard Contract.

9.2 Guidance on NHS-funded Nursing Care is available in the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care November 2012 (Revised)[1] and in the NHS-funded Nursing Care Practice Guide July 2013 (Revised)[2].

10. Impact

10.1 There is no change to the policy that all patients have the right to start non-urgent consultant-led treatment within 18 weeks of referral or request an offer of alternative providers that can start their treatment sooner.

10.2 NHS-funded Nursing Care is an existing policy and is not subject to change. From 1 April 2015 the rates have been increased by 1%, in line with general increases in NHS pay.

10.3 An Impact Assessment has not been prepared for this instrument.

11 Regulating small business

11.1 The legislation does not apply to small business.

12 Monitoring & review

12.1 The standing rules will be reviewed annually and updated as required.

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[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213137/National-Framework-for-NHS-CHC-NHS-FNC-Nov-2012.pdf

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211256/NHS-funded_Nursing_Care_Best_Practice_Guidance.pdf

13. Contact

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