EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE TRUST DEVELOPMENT AUTHORITY (AMENDMENT) REGULATIONS 2015

2015 No. 1559

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

The purpose of this instrument is to amend the National Health Service Trust Development Authority Regulations 2012 (the "2012 Regulations") to remove the disqualification provision to enable a person who is a chair, or another member, of Monitor to be appointed a non-officer member of the NHS Trust Development Authority ("NHS TDA"). A non-officer member of the NHS TDA includes the chair. This amendment will enable a person to be appointed as chair of both the NHS TDA and Monitor.

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

3.1 None

4. Legislative Context

The 2012 Regulations govern the membership and procedures of the NHS TDA. Regulation 3 of the 2012 Regulations sets out the restrictions to being a non-officer member of the NHS TDA. Regulation 3(1)(h) prevents the chair of Monitor or any other member of Monitor from being a non-officer member of the NHS TDA. This restriction is removed by this instrument.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

- What is being done and why

7.1 NHS TDA is a special health authority established by the National Health Service Development Authority (Establishment and Constitution) Order 2012 (S.I.2012/901). Article 4 of that Order provides for the NHS TDA to consist of a chair and not more than five other non-officers in addition to the chair and not more than five members who are officers of the NHS TDA. The main function of the NHS TDA is to exercise the functions of the Secretary of State in connection with the performance management and development of NHS trusts and the making of certain

public functions. The National Health Service Trust Development Authority Directions 2013 as amended by the National Health Service Trusts Development Authority (Amendment) Directions 2014[1] further directs the NHS TDA in respect of their functions.

7.2 Section 61 of the Health and Social Care Act 2012 (c.7) continued the existence of the Independent Regulator of NHS Foundation Trusts and that body became known as Monitor. Monitor regulates NHS services and in particular oversees the governance of NHS Foundation Trusts.

7.3 Both Monitor and NHS TDA are responsible for overseeing and, where necessary, improving the performance of their respective cohorts of providers; NHS Trusts and NHS Foundation Trusts. NHS TDA's purpose has been to performance manage NHS trusts with a view to their achieving sufficiently consistent clinical and financial performance for Monitor to authorise them as Foundation trusts, able to act with greater independence and less intervention.

7.4 Over recent years the distinction between NHS trusts and Foundation trusts, in terms of their performance, has become less clear, as has the need for two different organisations to oversee them using differing methods. Both Trusts and Foundation Trusts are struggling to achieve financial balance in particular and similar interventions are required in both sectors. For instance, the non-statutory Special Measures regime is already implemented by both organisations in their respective sectors. In future the two organisations will increasingly share the same operating model and, for this reason, a decision has been taken that a shared leadership team should be put in place.

7.5 For the above reasons, it was announced on 11th June 2015 that there will be a new working arrangement between Monitor and the NHS TDA, in order to achieve a significant improvement in the oversight, support and interventions made into the provider sector (NHS Trusts and NHS Foundation Trusts). As part of improving working arrangements, it is intended that Monitor and the NHS TDA should have a single, joint leadership team comprising of a joint Chief Executive and a joint Chair.

7.6 Working together, the two bodies will be able to jointly act under the new shared brand of '*NHS Improvement'* to performance manage provider delivery and support development. They will move toward a single oversight and intervention mechanism and increase support to drive improvements in performance and quality of care; boost efficiency; and ensure safety continues to be a key priority regardless of whether providers are NHS Trusts or Foundation Trusts.

7.7 The Permanent Secretary has requested that the Chair of the Audit Committee of the Department of Health carry out a review of options for future changes to the governance of both NHS TDA and Monitor in order to secure better alignment. This review will look into how many executive and non-executive directors are required on both Monitor's and NHS TDA's boards, as well as the committee structures operating below the boards. It is likely that this review may make recommendations that will require further amendments to both the TDA Regulations 2012 and the NHS TDA Establishment Order 2012.

7.8 It will be for the new CEO and Chair to then implement the preferred governance changes stemming from the above mentioned review, and it is to enable a

[1] https://www.gov.uk/government/publications/nhs-trust-development-authority-directions-2013

person to be appointed as chair of both NHS TDA and Monitor that these amending Regulations are being made now. It is possible that as a consequence of the outcome of the review, and contributions made by the new CEO and chair of the NHS TDA and Monitor, further amendments will be required later this year.

7.9 The intention is to appoint a new Chair of Monitor in the summer, and the same person will be appointed as chair of the NHS TDA once this restriction is removed.

7.10 Consideration will be given to whether further directions are to be given to the NHS TDA or alternatively the extent to which the current directions need to be amended. This will depend on the outcome of the joint working group [see 9.1 below], the Chair of the Audit Committee's review and views of the new Chair and CEO.

- Consolidation

There are no plans to consolidate the Regulations but this will be kept under review by the Department.

8. Consultation outcome

8.1 There is no statutory requirement to consult on these amendments. The Department has been working with the NHS TDA and Monitor since June following the Secretary of State announcement of the proposed move to a joint leadership, in particular on the process of designing how the joint working arrangements will work and how they can better align their operational processes. This has been done through a joint DH/NHS TDA/Monitor working group that has met numerous times. Direct and targeted consultation of the current Chairs of both organisations has also been undertaken, by means of meetings with the Permanent Secretary to discuss the proposed arrangements. Monitor and NHS TDA welcome the proposed amendment and will continue to work closely with the Department and each other in shaping how they will work together.

8.2 Given that the two affected bodies have been engaged as set out above, it was not considered necessary to carry out a formal consultation and request written responses from them.

9. Guidance

9.1 There is currently no intention to issue guidance, however there may be further directions to the NHS TDA as described in [7.10] above.

10. Impact

10.1 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 Department of Health will monitor the new working arrangements. This will be done as part of the formal accountability arrangements in place between the Department and both Monitor and the NHS TDA. These arrangements involve quarterly Ministerial meetings with the leaders of both organisations, and these will provide an appropriate opportunity for regular reviews of the new measure.

12.2 The Explanatory Memorandum to the 2012 Regulations stated that the 2012 Regulations would be reviewed in three years' time to assess whether there is a continued need for the Authority. The Department has concluded that there is clearly an ongoing requirement for the existence of the Authority given that there currently remain eighty nine NHS Trusts, and the NHS TDA remains the oversight body responsible for them.

13. Contact

Cariad Hazard at the Department of Health, Tel: (020) 72104381 or email: cariad.hazard@dh.gsi.gov.uk can answer any queries regarding the instrument.