EXPLANATORY MEMORANDUM TO

THE PRIMARY MEDICAL SERVICES (PROHIBITION ON THE SALE OF GOODWILL) REGULATIONS 2019

2019 No. 251

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care ("the Department") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations make provision in relation to prohibitions on the sale of goodwill of medical practices, in addition to that provided for under section 259 of the National Health Service Act 2006 ("the Act"). National Health Service primary medical services are delivered under various contracting routes which are set out in the Regulations[1] and APMS directions. These routes have been extended to include new contractual arrangements for the provision of primary medical services under Part 4 of the Act, namely an Integrated Care Provider ("ICP") Contract which is included in the list of those who may not sell or sub-contract the goodwill of their medical practices. The Regulations also revoke and replace the Primary Medical Services (Sale of Goodwill and Restrictions on Sub-contracting) Regulations 2004 (S.I. 2004/906) but save the effect of transitional provisions contained in regulation 6 of those Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The extent of this instrument is England and Wales only.

4.2 The territorial application of this instrument is England only because health is a devolved matter in Northern Ireland, Scotland and Wales.

5. European Convention on Human Rights

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

[1] National Health Service (General Medical Services Contracts) Regulations 2015 SI No. 1862 and the National Health Service (Personal Medical Services Agreements) Regulations 2015 SI No. 1879.

6. Legislative Context

6.1 These Regulations revoke and replace the Primary Medical Services (Sale of Goodwill and Restrictions on Sub-contracting) Regulations 2004 which placed prohibitions on the sale of goodwill of a medical practice. Section 259(1) of the Act contains the substantive provision for the prohibition on the sale of the goodwill in a medical practice. Section 259(4) and (5) enables further provision to be made in regulations as regards the circumstances in which a person is prohibited, including the relevant area in which the prohibition is to have effect. In addition, paragraph 1(4) of Schedule 21 to the Act enables regulations to prescribe the form of a certificate which must be issued by the Secretary of State where an application is made to the Secretary of State for certification, as provided by Schedule 21, that a particular transaction or series of transactions does not involve giving valuable consideration in respect of the sale of the goodwill in a medical practice.

7. Policy background

What is being done and why?

7.1 Promoting integrated care is a priority for the NHS. The NHS Long Term Plan, published in January 2018, set out the Government's intention to create an NHS that is increasingly joined-up and coordinated in its care, breaking down traditional barriers between care institutions, teams and funding streams.

7.2 Since the publication of its Five Year Forward View in 2014, NHS England ("NHSE") has been developing and testing new models of care to integrate different services.

7.3 NHSE tested these alternative models in a number of areas through its Vanguard programme, which ran from 2015 to 2018. The new models were found to have made a positive impact on emergency hospital admissions, with lower growth in admissions in Vanguard areas than in the wider NHS, despite receiving less than 0.1% of total NHS funding. NHS E now considers that this exercise has provided it with enough knowledge to commit to a wider series of community service redesigns.

7.4 The ICP Contracts will be a contractual option for local areas wishing to integrate care. Some commissioners of care want the opportunity to use a contract designed specifically to promote an integrated service model including primary care, wider NHS and some local authority services. This is intended to ensure that contracting, funding and organisational structures all help rather than hinder staff to do the right thing and to define more clearly who has overall responsibility for integrating and coordinating care.

7.5 Between August and October 2018, NHSE consulted on the draft ICP contract, which is a variant of the generic NHS Standard Contract applicable for integrated service provision. This followed the publication of draft contracts in December 2016 (known as the 'MCP Contract') and August 2017 (known as the 'ACO Contract') respectively[2]. Each iteration has taken into account the feedback received on the previous version.

[2] It is worth noting that the nomenclature of ICPs has evolved since the publication of the draft MCP contract in December 2016. They have also been referred to as 'accountable care organisations'. NHS England changed the terminology to 'Integrated Care Provider' in 2018 in recognition that, as reported by the House of Commons

7.6 Following review and analysis of the consultation feedback, the NHS Long Term Plan announced that the ICP Contract would be made available for use from 2019. The Long Term Plan also restated the expectation that ICP Contracts would be held by public statutory providers. NHSE is finalising its full response to the consultation, which will be published shortly.

7.7 NHSE intends to permit a small number of Clinical Commissioning Groups ("CCGs"), under its oversight, to use locally developed versions of its draft ICP contract to commission ICPs for their populations. The learning from this will inform any future expansion of the ICP model.

7.8 The Department has worked closely with NHSE in the development of the ICP Contract, alongside commissioners and Vanguard areas across the country. Through this process, a number of necessary changes to regulations have been identified. In some cases the changes create additional flexibilities, for example for GPs who wish to enter into ICP arrangements without terminating their existing contracts. However, the vast majority of the changes are minor and are intended to ensure that current rules continue to apply to the provision of services under the proposed new ICP contract, and to those organisations using it.

What is an ICP?

7.9 Population health approaches are developing as a response to rising and changing demand in a number of high income health systems. (e.g. Spain, Netherlands, New Zealand, USA). The intention is to establish the right clinical, organisational and financial incentives for providers to collaborate in order to deliver preventative, proactive, and coordinated health and care to a given population. ICPs are based on the premise that, by bringing providers together into a single organisation, the historical partitions between primary, community, mental health and social care and acute services can be removed. By dissolving these boundaries, a single provider is intended to have the flexibility to utilise its resources to maximise the health of the population.

7.10 To achieve this, commissioners in an area will have a contract with a single organisation for the great majority of health and care services and for the population health in the area. The ICP contract allows commissioners (including CCGs and Local Authorities) to commission primary medical services alongside community and acute services in an integrated way.

7.11 There has been some public concern over the development of ICPs, with concern expressed that these represented a means of privatising NHS services, with reference to the ACO model that exists in the United States. The government does not accept this, and the House of Commons Health and Social Care Committee's report on integrated care (June 2018) found that the prospect of a private provider holding an ICP contract was unlikely.

7.12 Moreover, two legal challenges to this policy have been unsuccessful. The first judicial review, against the Department and NHSE, argued that the contract constituted unlawful delegation by CCGs and the second, brought against NHSE, challenged the use of a whole population budget. This latter ruling was reaffirmed by the Court of Appeal in December 2018.

Health and Social Care Committee, use of the term 'accountable care' generated confusion about what was being proposed.

7.13 The Sale of Goodwill and Restrictions on Sub-contracting Regulations 2004 ("the 2004 Regulations"): These Regulations prevent the sale of goodwill in a medical practice (they do not prevent the sale of a medical practice). When a medical practice is sold, it must be sold for a price which represents the fair market value of its tangible assets (including premises). A premium cannot be placed on the purchase price of the business because of the goodwill that has been built up in it over the years. People providing services under primary medical services contracts cannot therefore make a profit based on the sale of the goodwill in an NHS medical practice. A similar restriction also applies to the sale of any shares in a company which is all or part of a medical practice. The value of any such shares when sold must not include any element in respect of the goodwill of the company, or part of the company, in which the share is held.

What is changing and why?

7.14 Currently, providers of primary medical services under an ICP Contract are not explicitly included on the list of those persons who may not sell the goodwill of their medical practices. The policy position is that the prohibition on the sale of goodwill currently provided for in section 259(1) of the National Health Service Act 2006 and in the Primary Medical Services (Sale of Goodwill and Restrictions on Sub-contracting) Regulations 2004 should apply to those providing primary medical services under the new ICP Contract in the same way as it does for those persons providing primary medical services under existing primary medical services (GMS and PMS) contracts. The policy position is also that the prohibition on the sale of goodwill will also apply to persons providing primary medical services under sub-contracting arrangements with an ICP.

7.15 The new Primary Medical Services (Prohibition on the Sale of Goodwill) Regulations 2019 will extend the prohibition on the sale of goodwill in a medical practice to providers or performers of primary medical services under an ICP contract or sub-contract and, for these purposes, "medical practice" is defined by reference to the whole or part of the contractual arrangements which relate to the provision of primary medical services under an ICP Contract.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

10.1 Between 11 September 2017 and 3 November 2017, the Department ran a public consultation on the proposed changes to regulations to support the ICP contract (known, at that time, as the 'ACO contract'), including the Sale of Goodwill regulations. This consultation 'Accountable Care Organisations: Consultation on changes to regulations required to facilitate the operation of an NHS Standard Contract (Accountable Care Models)', specifically asked consultees to consider whether the draft amendments to regulations which were consulted on delivered the policy objective of supporting the introduction of a model ACO contract.

10.2 However, the consultation became the subject of a '38 Degrees' campaign and the Department received over 45,000 responses. These responses highlighted three main concerns: lack of Parliamentary scrutiny; inadequate public consultation; opposition to privatisation of the NHS. Departmental analysis found that 44,621 of the responses can be attributed to the 38 degrees campaign. These responses took the format of one of 23 very similar templates. 811 responses did not follow these templates, but also expressed opposition to privatisation, gave examples from their personal experience and voiced general concerns on the future of the NHS.

10.3 Nine responses directly addressed the specific amendments to regulations and answered the consultation questions: British Dental Association, British Medical Association (BMA), Care Quality Commission, Healthwatch Committee, Hillingdon Healthwatch, National Community Hearing Association, NHSE, Optical Federation and the Royal College of Anaesthetists. These have resulted in a number of post-consultation revisions to the regulations.

10.4 Following comments from the BMA, the draft regulations have been amended to remove the restrictions on Sale of Goodwill by sub-contractors of GMS/PMS or APMS contractors.

10.5 The Department published its consultation response in April 2018.

11. Guidance

11.1 The Department does not intend to produce guidance to accompany the Regulation.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument since it does not impose significant costs on the NHS and does not affect private business or other government departments. The legislation does not compel CCGs to change how they procure services, but gives them an option to do so.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses. GP practices are exempt from the Small Firm Impact Test as they are considered part of the public sector due to their provision of primary medical services for the NHS. Public sector organisations are exempt from this test.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is to rely on the annual reviews that take place as part of GMS/PMS/APMS contracting. It is the role of NHSE (the Board) to monitor these contracts, although the Secretary of State retains responsibility for the regulations made under section 259(4) of the NHS Act 2006.

15. Contact

15.1 Laura Bragiel at the Department of Health and Social Care (Telephone: 02079722813; laura.bragiel@dhsc.gov.uk) can answer any queries regarding the instrument.

15.2 Edward Scully at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Stephen Hammond, Minister of State for Health at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.