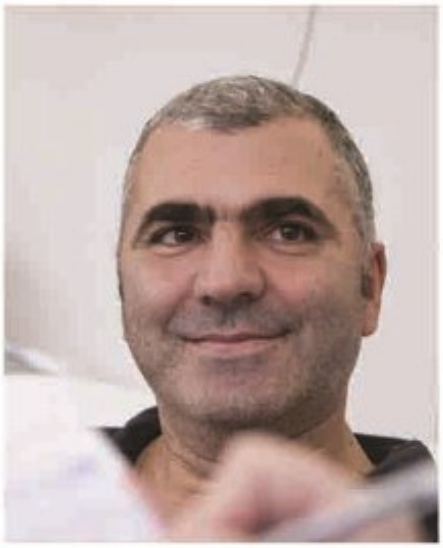
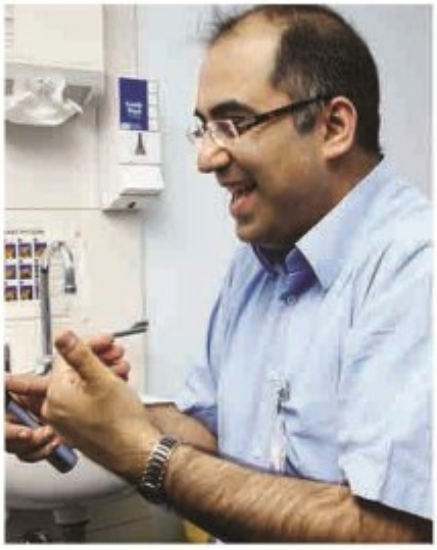
NHS England

Contract breaches, sanctions and termination for primary medical services





THE NHS CONSTITUTION
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Contract breaches, sanctions and termination for primary medical services

Standard operating policies and procedures for primary care

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Information Reader Box

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Nursing	Guidance
Patients & Information	Resources
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Document Status

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Contents

Purpose of policy

1 NHS England is responsible for direct commissioning of services beyond the remit of clinical commissioning groups, namely primary care, offender health, military health and specialised services.

2 This document forms part of a suite of policies and procedures to support commissioning of primary care. They have been produced by Primary Care Commissioning (PCC) for use by NHS England's area teams (ATs).

3 The policies and procedures underpin NHS England's commitment to a single operating model for primary care – a "do once" approach intended to ensure consistency and eliminate duplication of effort in the management of the four primary care contractor groups from 1 April 2013.

4 All policies and procedures have been designed to support the principle of proportionality. By applying these policies and procedures, area teams are responding to local issues within a national framework, and our way of working across NHS England is to be proportionate in our actions.

5 The development process for the document reflects the principles set out in *Securing excellence in commissioning primary care*[1], including the intention to build on the established good practice of predecessor organisations.

6 Primary care professional bodies, representatives of patients and the public and other stakeholders were involved in the production of these documents. NHS England is grateful to all those who gave up their time to read and comment on the drafts.

7 The authors and reviewers of these documents were asked to keep the following principles in mind:

- Wherever possible to enable improvement of primary care
- To balance consistency and local flexibility
- Alignment with policy and compliance with legislation
- Compliance with the Equality Act 2010
- A realistic balance between attention to detail and practical application
- A reasonable, proportionate and consistent approach across the four primary care contractor groups.

8 This suite of documents will be refined in light of feedback from users.

[1] *Securing excellence in commissioning primary care* http://bit.ly/MJwrfA

9 This document should be read in conjunction with:

i. Identification management and support of independent contractors whose performance gives cause for concern
ii. Dispute resolution for primary medical services
iii. Managing Contract variations for primary medical services contracts
iv. Managing a Personal Medical Services contractors' right to a General Medical Services contract
v. Managing the death of a contractor in primary medical services
vi. Managing the end of time limited contracts for primary medical services
vii. Primary Medical Services Assurance Framework
viii. Guidance to support delivery of assurance management in primary medical services

Policy aims and objectives

10 This policy outlines the approach to be taken by NHS England when the general medical services (GMS) contract is considered to have been breached. Whilst it is likely that Personal Medical Services (PMS), Alternative Provider Medical Services (APMS) and Specialist Personal Medical Services (SPMS) processes would mirror, in the most part, the policy defined for GMS, there will be some key differences which will be highlighted within this document.

11 This policy is to be read in conjunction with the policy for the identification, management and support of independent contractors whose performance gives cause for concern and, where appropriate, the policy for variations for Primary Medical Services contracts.

Background

12 Whilst most health care professionals practise to a very high standard, some individuals may occasionally work in ways that pose a serious risk to patient safety. In many instances this can be unintentional and the clinician's performance may be affected by a combination of personal and situational factors, such as illness or professional isolation and in these cases NHS England shall refer to the policy for Identification management and support of independent contractors whose performance gives cause for concern.

13 NHS England will always seek to take the most appropriate action in order to protect patient safety and to mitigate on-going risks to high quality service provision.

14 In most cases, the issue of a breach notice, application of a sanction or a move to terminate a contract should be considered as the final stages in a process where NHS England and contractor have endeavoured to resolve matters satisfactorily, without the need to take formal contractual steps.

15 However, there will be occasions when a contractor is either unable or unwilling to change their behaviour or remedy a situation which may then result in a direct breach of their contracted terms and/or pose a significant risk to patient safety, requiring immediate action by NHS England to quickly resolve the matter.

16 This policy is designed to give an overview of the procedure to be followed by NHS England when taking formal steps in resolving contractual and performance related issues of independent contractors providing primary medical care services.

Scope of the policy

17 This policy outlines the approach to be taken by NHS England when a contract is considered to have been breached. It does not cover the process of investigation, roles and responsibilities leading up to that decision.

18 The regulations governing the management of local primary care contracts and agreements do not set out any statutory decision-making procedure for NHS England to follow when considering whether or not to take action under such contracts or agreements however standard contracts do provide that NHS England and contractor must act in good faith as responsible bodies (GMS Standard Contract 9, 10) and must therefore, whenever reasonably possible, endeavour to manage situations without formal contract sanctions.

20 Given that any decision to issue a breach or remedial notice, apply sanctions or terminate a contract or agreement can be challenged by the contractor under appeal, it is essential that NHS England follows, and can demonstrate that they have followed, due process in investigating, communicating and implementing actions in this respect and that NHS England has acted fairly and reasonably throughout.

21 It is, therefore, essential that NHS England and Area Teams (ATs) maintain thorough and accurate records of all communications and discussions in respect of all notices under this policy.

Types of Contract

22 Where a primary medical services contractor holds a registered list of patients, and provides the full range of essential services, there are three possible contracting routes. These are:

- A general medical services (GMS) contract;
- A personal medical services (PMS) agreement; or
- An alternative provider medical services (APMS) contract.

23 A single contractor may hold a variety of contract types with a variety of commissioners. For example, an existing GMS contractor might also hold an APMS contract with the same or another commissioner.

24 **General Medical Services (GMS)** arrangements are governed by the GMS Regulations (SI No.2004/291, as amended from time to time). These are based on national agreement between the Department of Health (or bodies acting on behalf of the Department of Health) and the British Medical Association and are underpinned by nationally agreed payment arrangements as set out in the Statement of Financial Entitlements.

25 **Personal medical services (PMS)** arrangements are an alternative to GMS, in which the contract (the "PMS agreement") is agreed locally between the contractor and the commissioning organisation. The mandatory contract terms are set out in the PMS Regulations (SI No.2004/627, as amended from time to time) but still allow local flexibility for negotiation and there are some distinct differences in the way in which GMS and PMS contract variations must be managed.

26 Importantly there is no requirement to follow the nationally agreed pay structure for GMS, i.e. the Statement of Financial Entitlements does not apply to PMS agreements. Commissioners and PMS contractors are therefore free to negotiate entirely separate payment arrangements, although common elements are often found in both contract types e.g. QOF, but this also needs to be taken into consideration for the purposes of variations across the differing routes.

27 The mandatory requirements that apply to Alternative provider medical services (APMS) contracts are set out in the Alternative Provider Medical Services Directions 2010 (as amended). These Directions place minimum requirements on APMS contractors which broadly reflect those for PMS contractors but otherwise enable the remainder of the contract to be negotiated between the commissioner and the contractor or, more commonly, stipulated by the commissioner during the course of a tender process. Please see Annex 2 for further information.

28 Unlike GMS and PMS arrangements, which place significant restrictions on

the organisational structure of the contractor, there are fewer such restrictions for APMS contractors.

29 All contractors who have a list of registered patients must provide essential services. However, unlike GMS Regulations, PMS Regulations do not require provision of essential services and therefore a list of registered patients is not required. Those PMS agreements that take advantage of this flexibility and do not include the full range of essential services are known as Specialist PMS (SPMS) arrangements and are again locally agreed contracts.

Local Medical Committee (LMC)

30 1. Whenever NHS England is considering –

a. terminating the contract;
b. which of the alternative notices in writing it will serve; or
c. imposing a contract sanction,

it shall, whenever it is reasonably practicable to do so, consult with the Local Medical Committee before taking action.

31 2. Whether or not the LMC has been consulted, whenever NHS England imposes a contract sanction on a contractor or terminates a contract, it shall, as soon as reasonably practicable, notify the LMC in writing of the contract sanction imposed or of the termination of the contract (as the case may be).

Contract breaches

32 The contract regulations make a clear distinction between breaches that are capable of remedy and those which are not.

33 Breaches may occur as a result of:

- Actual failure to deliver the contract in relation to mandatory or locally agreed clauses
- Behaviour that gives cause for concern, which may (or may not) lead to a failure to deliver a contract, and which might include professional misconduct, inappropriate clinical behaviour or fraud

A. Remedial Breach

34 Where a contractor has been found to have breached the contract and the breach is determined to be capable of remedy[2]. then the Area Team (AT) may issue a Remedial Breach notice to the contractor setting out the

[2] *GMS Contract Regulations 2004, Schedule 6 Part 8, Paragraph 115*

actions that must be taken to remedy the breach.

35 For example a contractor may be found to not have a practice leaflet including the information required by Schedule 10 of the GMS and PMS regulations.

36 ATs shall take the following steps:

1. Initially the AT should contact the contractor and discuss the breach with them and the action that they may be entitled to take, i.e. the issue of a remedial notice.

2. The contractor should be afforded the opportunity to provide an explanation as to the circumstances that lead to the breach and this discussion should be recorded accurately in writing for the contract file.

3. The AT shall then investigate the breach and any details recorded during the contractor discussion which are pertinent to the matter at hand and examine any evidence in relation to the breach.

4. If the AT is satisfied that the matter is a breach which is capable of remedy then they may issue a remedial notice to the contractor, requiring them to remedy the breach,

5. The AT may then consider any further action NHS England is otherwise entitled to take by virtue of the contract, at the earliest opportunity after the initial matter was raised.

6. It is important that when steps 1 to 4 are undertaken, this is completed as quickly as is reasonably possible as long delays between the breach occurring, or NHS England becoming aware of the breach, and the notice being issued are inappropriate and can lead to further complications once, and if, the matter proceeds to a full breach, possible termination and dispute.

7. A remedial notice shall specify:

   - Details of the breach, which led to the remedial notice being issued and any evidence gathered in respect of the breach;
   - The steps the contractor must take in order to remedy the breach to NHS England's satisfaction;
   - The notice period during which the steps must be taken;
   - Any arrangements for reviewing the matter to ensure that the

requirements of the remedial notice have been met (Annex 2); and
- The actions that NHS England shall take if the contractor fails to satisfactorily remedy the breach.

The notice period shall, unless NHS England is satisfied that a shorter period is necessary to protect the safety of the contractor's patients, or protect itself from material financial loss, be no less than 28 days from the date that notice is given.

8. When issuing a remedial notice, breach notice, notice of sanction or notice of termination it is essential that the AT retains a record that the contractor has received the notice and the date of its delivery. This can be achieved either by hand delivery of the notice upon which the contractor should be asked to sign a Received Receipt (Annex 3), or by recorded or special delivery arrangements through the Royal Mail, when all tracking records must be retained on file.

9. The AT shall within the notice have defined a date for review and it is essential that this is followed up appropriately and in a timely fashion.

10. Where the AT is satisfied that the contractor has taken the required steps to remedy the breach within the notice period, a letter will be issued to the contractor informing them that the terms of the remedial notice have been satisfied and that no further action will be taken at this stage.

11. The letter should also set out the consequences of the contractor further breaching their agreement in that if, following a breach notice or a remedial notice, the contractor –

    a. repeats the breach that was the subject of the breach notice or the remedial notice; or
    b. otherwise breaches the contract resulting in either a remedial notice or a further breach notice,

    NHS England may serve notice on the contractor terminating the contract with effect from such date as may be specified in that notice. (Annex 3).

12. Where the AT is not satisfied that the contractor has taken the required steps to remedy the breach by the end of the notice period, the AT shall inform the contractor that they have failed to

meet the terms of the remedial notice and that NHS England may terminate the contract with effect from such date as the AT may specify in a further notice to the contractor. (Section 5 of this policy)

13. NHS England shall not exercise its right to terminate the contract unless it is satisfied that the cumulative effect of the breaches is such that NHS England considers that to allow the contract to continue would be prejudicial to the efficiency of the services to be provided under the contract.

14. When considering a cumulative effect ATs must act proportionately and reasonably having full regard of the nature and timeframe of the notices issued.

15. If the contractor is in breach of any obligation and a breach notice or a remedial notice in respect of that default has been given to the contractor, NHS England may withhold or deduct monies which would otherwise be payable under the contract in respect of that obligation which is the subject of the default.

B. Breach

37 Where the contractor has breached the contract and that breach is not capable of remedy the AT may serve notice on the contractor, a "Breach Notice", requiring the contractor not to repeat the breach (Annex 5)

38 For example, a contractor's surgery was closed during core hours and there had been no access for the contractors registered patients to essential services throughout the closure.

39 Historically some practices have, for example, chosen to close early on Christmas Eve however have not secured access to services for their patients to cover the closed period prior to any Out of Hours arrangements starting at 6.30 pm. As this is not a matter that can be remedied, this would be considered a breach.

40 1. In these circumstances the AT shall follow steps 1 to 5 in Section 2A above prior to the issue of a breach notice.

2. The breach notice shall specify details of the breach, which led to the breach notice being issued and the requirement that the contractor must not repeat the breach again.

3. The letter should also set out the consequences of the contractor further breaching their agreement in that if, following a breach notice the contractor –

   a. repeats the breach that was the subject of the breach notice or the remedial notice; or
   b. otherwise breaches the contract resulting in either a remedial notice or a further breach notice, NHS England may serve notice on the contractor terminating the contract with effect from such date as may be specified in that notice.

4. When issuing a breach notice, notice of sanction or notice of termination it is essential that ATs retain a record that the contractor has received the notice and the date of its delivery. This can be achieved either by hand delivery of the notice upon which the contractor should be asked to sign a Received Receipt (Annex 3), or by recorded or special delivery arrangements through the Royal Mail, when all tracking records must be retained on file.

5. As in points 2.A, 12 and 13, NHS England shall not exercise its right to terminate the contract unless it is satisfied that the cumulative effect of the breaches is such that NHS England considers that to allow the contract to continue would be prejudicial to the efficiency of the services to be provided under the contract.

6. If the contractor is in breach of any obligation and a breach notice or a remedial notice in respect of that default has been given to the contractor, NHS England may withhold or deduct monies which would otherwise be payable under the contract in respect of that obligation which is the subject of the default. (Sanctions)

Application of sanctions

41 Sanctions cannot be applied to a contract unless NHS England is in a position to move to terminate. As an alternative to terminating a contract or agreement, NHS England may, in certain circumstances consider the application of sanctions.[3]

42 Where the termination of a contract or agreement is being considered on the grounds that a contractor has breached the contract or agreement or has failed to respond to a remedial notice, NHS England will in all cases

[3] *GMS Regulations 2004 Schedule 6, Part 8 paragraph 117 applies*

consider the option of applying sanctions as an alternative.
Such sanctions may involve:

- Termination of specified reciprocal obligations, such as the right to provide additional or enhance services, under the contract or agreement;
- Suspension of specified reciprocal obligations under the contract or agreement for a period of up to six months; or
- Withholding or deducting monies otherwise payable under the contract or agreement

43 The choice of which sanction to use would ordinarily depend on the nature of the breach, or cumulative effect, and what is felt to be the most appropriate and proportionate action in those circumstances. For example, if the breaches have occurred in relation to a specific service element under the contract, it might be most appropriate to move to terminate that specific service, such as an additional service.

44 Where NHS England decides that the most appropriate sanction would be to withhold or deduct monies, this must be calculated in accordance with set criteria in order to establish a consistent, fair and measured approach

45 1. The AT shall issue a notice of their intent to apply a sanction to the contractor which should include:

   a. The nature of the sanction to be applied;
   b. If withholding or deducting monies, how this has been calculated and the duration of any such sanction,
   c. If services are to be terminated, which services and from what date,
   d. If suspension of specified reciprocal obligations under the contract or agreement, the period of that suspension and its end date; and
   e. The contractors right to appeal to this decision(Annex 7)

2. If there is a dispute between NHS England and the contractor in relation to a contract sanction that the AT is proposing to impose, the AT shall not, subject to paragraph 5 below, impose the proposed contract sanction except in the circumstances specified in paragraph (3)(a) or (b) below.

3. If the contractor refers the dispute relating to the contract sanction to the NHS dispute resolution procedure or court proceedings within 28 days beginning on the date on which NHS England served notice on the contractor (or such longer period

as may be agreed in writing with the AT), and notifies the AT in writing that it has done so, the AT shall not impose the contract sanction unless–

a. there has been a determination of the dispute and that determination permits NHS England to impose the contract sanction; or
b. the contractor ceases to pursue NHS dispute resolution procedure or court proceedings, whichever is the sooner.

4. If the contractor does not invoke NHS dispute resolution procedure or court proceedings within the time specified in paragraph (3), the AT shall be entitled to impose the contract sanction immediately.

5. If NHS England is satisfied that it is necessary to impose the contract sanction before the NHS dispute resolution procedure or court proceedings is concluded in order to –

a. protect the safety of the contractor's patients; or
b. protect itself from material financial loss, the AT shall be entitled to impose the contract sanction immediately, pending the outcome of that procedure.

Additional provisions specific to contracts with two or more individuals (partnership, companies limited by shares or Qualifying Bodies)[4]

46 1. Where the contractor is a company limited by shares, if NHS England becomes aware that the contractor is carrying on any business which NHS England considers to be detrimental to the contractor's performance of its obligations under the contract–

a. the AT is entitled to give notice to the contractor requiring that it ceases carrying on that business before the end of a period of not less than 28 days beginning on the day on which the notice is given (the notice period); and
b. if the contractor has not satisfied the AT that it has ceased carrying on that business by the end of the notice period, NHS England may, by a further written notice, terminate the contract immediately or from such date as may be specified in the notice.

[4] *GMS Contract Regulations, Schedule 6, Part 8, 116 or PMS Agreement Regulations, Schedule 5, Part 8, 108*

2. A notice in this respect should include:

   a. The nature of the business that the contractor is to cease,
   b. Any details that NHS England has relied upon in reaching its decision to issue the notice
   c. The date in which the business must be ceased which should not be less than 28 days from the date of the notice
   d. The date of the review of the notice; and
   e. The actions that the AT will take should the contractor not satisfy NHS England that it has ceased carrying on that business within the specified notice period.

3. Where the contractor is two or more persons practising in partnership, NHS England shall be entitled to terminate the contract by notice in writing on such date as may be specified in that notice where one or more partners have left the practice during the existence of the contract if in its reasonable opinion, NHS England considers that the change in membership of the partnership is likely to have a serious adverse impact on the ability of the contractor or NHS England to perform its obligations under the contract.

4. A notice given to the contractor in this respect should specify –

   a. the date upon which the contract is to be terminated; and
   b. NHS England s reasons for considering that the change in the membership of the partnership is likely to have a serious adverse impact on the ability of the contractor or NHS England to perform its obligations under the contract.

Terminations of contract or agreement

47 Termination is, of course, a very significant action to take both on the part of NHS England and the contractor and is an area of high risk for both parties in respect of financial impact and continuity of services.

48 It is, therefore, essential that NHS England ATs maintain thorough and accurate records of all communications and discussions in respect of all notices under this policy and have, where appropriate, followed all other possible contractual routes to resolve the matter.

49 Contractors have the right to appeal against notices', sanctions and termination so it is essential that NHS England follow and can demonstrate that they have followed due process in investigating, communicating and

implementing actions in this respect.

50 There are recorded cases where a commissioner organisation decision has been overturned due to a lack of evidence through poor administrative processes, or having not followed correct procedure and this can lead to a very time consuming, costly and complex outcome for NHS England.

51 It is essential that prior to moving to terminate a contract or agreement, NHS England are satisfied that they are fully within their rights to do so. Termination under GMS may only be affected in the following circumstances:

- Breach of conditions under Regulation 4[5]
- where there is a serious risk to the safety of the contractor's patients or risk of material financial loss to NHS England
- for the provision of untrue information
- on fitness grounds
- for unlawful sub-contracting
- failure to comply with a Remedial Notice or repetition of a breach that has already been the subject of a Remedial Notice or Breach Notice (Section 2 of this policy)
- Upon agreement of NHS England and the Contractor in writing
- On notice from the contractor
- If in its reasonable opinion, NHS England considers that a change in membership of the partnership is likely to have a serious adverse impact on the ability of the contractor or NHS England to perform its obligations under the contract, and of course
- on the death of a single handed contractor.

52 There are also two additional rights to terminate under PMS, which are not allowed under GMS:

- by either party on notice;[6] and
- by the contractor when they exercise their right to a GMS contract. Please see the policy for Managing a Personal Medical Services contractors' right to a General Medical Services contract.

53 The only other exception to this rule is when a contract terminates by reaching its natural end date.

54 Time limitations on the duration of a contract do not apply to GMS (as a general rule) as this is a contract in perpetuity, though would most certainly

[5] *GMS Contract Regulations, Part 2*
[6] *PMS Agreement Regulations, Schedule 5,Part 8, 100*

apply to APMS and SPMS agreements and may apply to some PMS agreements (dependent on the local terms agreed). Please see the policy for Managing the end of time limited contracts for primary medical services

55 The only time that a GMS agreement might be time limited, is when NHS England have entered into a new short term arrangement (maximum of 12 months), for the provision of services to the former patients of a contractor, following the termination of that contract.

1. Termination for breach of conditions under Regulation 4[7]

56 Regulation 4 (of the GMS Contract Regulations) sets out the Conditions relating solely to medical practitioners and these are detailed in full at Annex 8 to this policy document.

57 If NHS England establish that a contractor no longer satisfies these conditions, subject to the relevant clauses in the regulations[8] the AT may issue a notice to terminate the contract immediately, or at an agreed time, which must not exceed 6 months from the issue of the notice (interim period).

58 The exceptions to this rule are for suspension by a Fitness to practice panel or an Interim Orders Panel.

2. Termination by NHS ENGLAND for the provision of untrue information[9]

59 NHS England may serve notice in writing on the contractor terminating the contract immediately, or from such date as may be specified in the notice if, after the contract has been entered into, it comes to the attention of NHS England that written information provided to NHS England by the contractor[10] -

a. before the contract was entered into; or
b. pursuant to paragraph 85(2) or (3) or 86(2) of the GMS

Regulations, or 80(2) or (3) of the PMS Agreement Regulations, in relation to the conditions set out in regulations 4 and 5 (and compliance with those conditions) was, when given, untrue or inaccurate in a material respect.

[7] *PMS Agreement Regulations, Schedule 5, Part 8, 103*
[8] *GMS Contract Regulations, Schedule 6, Part 8, 111*
[9] *GMS Contract Regulations, Schedule 6, Part 8, 112*
[10] *PMS Agreement Regulations, Schedule 5, Part 8, 104*

3. Termination by NHS ENGLAND for unlawful sub-contracting[11]

60 If it comes to NHS England's attention that the contractor has subcontracted its provision of essential services to a company or firm[12]:

- owned wholly or partly by the contractor, or by any former or current employee of, or partner or shareholder in, the contractor;
- formed by or on behalf of the contractor, or from which it derives or may derive a pecuniary benefit; or
- formed by or on behalf of a former or current employee of, or partner or shareholder in, the contractor, or from which such a person derives or may derive a pecuniary benefit,
- where that company or firm is or was formed wholly or partly for the purpose of avoiding the restrictions on the sale of the goodwill of a medical practice in section 54 of the Act or any regulations made wholly or partly under that section.

61 NHS England shall serve a notice in writing on the contractor terminating the contract immediately or instructing it to terminate the sub-contracting arrangements that give rise to the breach immediately, and if it fails to comply with the instruction, NHS England shall serve a notice in writing on the contractor, terminating the contract forthwith.

4. Termination by the contractor[13]

62 1. A contractor may terminate the contract by serving notice in writing on NHS England at any time.

2. Where a contractor serves notice to terminate, the contract shall, subject to sub-paragraph (3), terminate six months after the date on which the notice is served (the termination date), save that if the termination date is not the last calendar day of a month, the contract shall instead terminate on the last calendar day of the month in which the termination date falls.

3. Where the contractor is an individual medical practitioner, sub-paragraph (2) shall apply to the contractor, save that the reference to six months shall instead be to three months.

63 NHS England ATs should be prepared for any such notice, as neither three, nor six, months are long enough periods to go through a formal tender process, particularly when the contractor is an owner of the practice

[11] *GMS Contract Regulations Schedule 6, Part 8, 114A.*
[12] *PMS Agreement Regulations, Schedule 5, Part 8, 106A*
[13] *GMS Contract Regulations, Schedule 6, Part 8, 108*

premises and does not wish to enter into Leasing arrangements with another party.

64 NHS England becomes legally responsible for ensuring continuity and provision of primary medical services to patients previously registered under the terminated contract though this does not remove the contractors own obligations in this respect, leading up to the termination, to cooperate with NHS England in performing these functions.

65 As in previous cases of termination or variation (see policy for managing Contract Variations, for primary care), there is a requirement for NHS England to consult on any changes to health service provision with patients, the public and the Overview and Scrutiny committees and to consider all possible opportunities prior to making a final decision in respect of their on-going obligation to secure health services for the population. These possible opportunities and the criteria for consideration are set out in Annex 9 to this policy.

5. Termination by NHS England where there is a serious risk to the safety of the contractor's patients or risk of material financial loss to NHS England[14]

66 The grounds for this form of termination are much more complex than those already covered in this policy. Though they are most likely to relate to the conditions set out in Regulation 4, this is not defined in either the GMS or PMS regulations. In most cases there is likely to have been significant dialogue and engagement between NHS England and the contractor prior to any such grounds being established.

67 There will, of course, always be the exception to this rule where a breach is so significant that it warrants an immediate termination of the contract, however, in general most cases resulting in this action will have taken some time to investigate thoroughly and to gather the evidence to support a termination on these grounds.

6. Other grounds for termination of contracts[15]

68 1. NHS England may serve notice in writing on the contractor terminating the contract forthwith, or from such date as may be specified in the notice if [16] -

a. in the case of a contract with a medical practitioner, that

[14] *PMS Agreement Regulations, Schedule 5, Part 8, 106*
[15] *GMS Contract Regulations, Schedule 6, Part 8, 113*
[16] *PMS Agreement Regulations, Schedule 5, Part 8, 105*

medical practitioner;

b. in the case of a contract with two or more individuals practicing in partnership, any individual or the partnership; and

c. in the case of a contract with a company limited by shares –

i. the company,
ii. any person legally and beneficially owning a share in the company, or
iii. any director or secretary of the company, falls within sub-paragraph (2) during the existence of the contract or, if later, on or after the date on which a notice in respect of his compliance with the conditions in regulation 5 was given. (Fitness Grounds)

2. A person falls within this sub-paragraph if –

a. it does not satisfy the conditions prescribed in section 28S(2)(b) or (3)(b) of the Act;
b. he or it is the subject of a national disqualification;
c. he or it is disqualified or suspended (other than by an interim suspension order or direction pending an investigation or a suspension on the grounds of ill-health) from practising by any licensing body anywhere in the world;
d. he has been dismissed (otherwise than by reason of redundancy) from any employment by a health service body unless before NHS England has served a notice terminating the contract pursuant to this paragraph, he is employed by the health service body that dismissed him or by another health service body;
e. he or it is removed from, or refused admission to, the national performers list by reason of inefficiency, fraud or unsuitability (within the meaning of section 49F(2), (3) and (4) of the Act respectively) unless his name has subsequently been included in such a list;
f. he has been convicted in the United Kingdom of murder;
g. he has been convicted in the United Kingdom of a criminal offence other than murder and has been sentenced to a term of imprisonment of over six months;
h. he has been convicted elsewhere of an offence which would if committed in England and Wales –
i. constitute murder, or
ii. constitute a criminal offence other than murder, and been

sentenced to a term of imprisonment of over six months;

i. he has been convicted of an offence referred to in Schedule 1 to the Children and Young Persons Act 1933 (offences against children and young persons with respect to which special provisions of this Act apply) or Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under the age of 17 years to which special provisions apply);
j. he or it has -
    i. been adjudged bankrupt or had sequestration of his estate awarded unless (in either case) he has been discharged or the bankruptcy order has been annulled,
    ii. been made the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order under Schedule 4A to the Insolvency Act 1986 or Schedule 2A to the Insolvency (Northern Ireland) Order 1989 unless that order has ceased to have effect or has been annulled,
    iii. made a composition or arrangement with, or granted a trust deed for, his or its creditors unless he or it has been discharged in respect of it, or
    iv. been wound up under Part IV of the Insolvency Act 1986;
k. there is -
    i. an administrator, administrative receiver or receiver appointed in respect of it, or
    ii. an administration order made in respect of it under Schedule B1 to the Insolvency Act 1986;
l. that person is a partnership and -
    i. a dissolution of the partnership is ordered by any competent court, tribunal or arbitrator, or
    ii. an event happens that makes it unlawful for the business of the partnership to continue, or for members of the partnership to carry on in partnership;
m. he has been -
    i. removed from the office of charity trustee or trustee for a charity by an order made by the Charity Commissioners or the High Court on the grounds of any misconduct or mismanagement in the administration of the charity for which he was responsible or to which he was privy, or which he by his conduct contributed to or facilitated, or
    ii. removed under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (powers of the Court of Session to deal with management of charities), or under section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (powers of Court of Session) from being concerned in the management or control of any body;
n. he is subject to a disqualification order under the Company

Directors Disqualification Act 1986, the Companies (Northern Ireland) Order 1986 or to an order made under section 429(2)(b) of the Insolvency Act 1986 (failure to pay under county court administration order); or

o. he has refused to comply with a request by NHS England for him to be medically examined on the grounds that it is concerned that he is incapable of adequately providing services under the contract and, in a case where the contract is with two or more individuals practising in partnership or with a company, NHS England is not satisfied that the contractor is taking adequate steps to deal with the matter.

69 3. NHS England shall not terminate the contract where NHS England is satisfied that the disqualification or suspension imposed by a licensing body outside the United Kingdom does not make the person unsuitable to be –

a. a contractor;
b. a partner, in the case of a contract with two or more individuals practising in partnership; or
c. in the case of a contract with a company limited by shares -
   i. a person legally and beneficially holding a share in the company, or
   ii. a director or secretary of the company,
   as the case may be.

70 4. NHS England shall not terminate the contract, under 2(d)-

a. until a period of at least three months has elapsed since the date of the dismissal of the person concerned; or
b. if, during the period of time specified in paragraph (a), the person concerned brings proceedings in any competent tribunal or court in respect of his dismissal, until proceedings before that tribunal or court are concluded, and NHS England may only terminate the contract at the end of the period specified in paragraph (b) if there is no finding of unfair dismissal at the end of those proceedings.

71 5. NHS England shall not terminate the contract in respect of (2)(h) where NHS England is satisfied that the conviction does not make the person unsuitable to be –

a. a contractor;
b. a partner, in the case of a contract with two or more individuals practising in partnership; or

c. in the case of a contract with a company limited by shares -
   i. a person legally and beneficially holding a share in the company, or
   ii. a director or secretary of the company,
   as the case may be.

7. Arrangements for considering terminations of contracts

72 There are no set timescales for notification of termination to the Contractor, nor for a response from the Contractor, as the nature of each potential termination will be different – some may require immediate attention, while others may be less serious though still warrant a termination. However, wherever possible, a contractor will be allowed 28 days to provide written representations.

73 The AT should be aware that the dispute resolution process has confirmed the legal position that a different standard is required in terminating a contract to that required in offering a contract.

74 www.nhsla.com/fhsau/Documents/16023%20-%20Medical%20Dispute%20Resolution.pdf

75 1. NHS England must establish that they have grounds to move to terminate a contract or agreement under the terms laid out in Regulations, following due process and investigation of the facts and providing the contractor the opportunity to provide a response to allegations, wherever possible.

2. NHS England will consider the available information and decide an appropriate course of action and will determine by reference to, and in accordance with, the appropriate statutory regulations:

- Whether the contract or agreement should be terminated with immediate effect, or
- Whether the contract should be allowed to continue for an interim period [not normally to exceed six months] if NHS England is satisfied that the contractor has in place adequate arrangements for the provision of services during the interim period.

3. The AT shall provide a notice of termination to the contractor, as soon as is practicably possible, to include :

   a. the reasons for termination of the contract with reference to the relevant contractual, agreement clauses,
   b. the evidenced relied on in making the decision to terminate,

c. the date when termination will become effective,
d. the actions that the contractor must take leading up to the termination in respect of their duty of cooperation and on-going patient safety,
e. any other arrangements included in the contract/agreement on the arrangements on termination, and
f. the Contractor's right to invoke the NHS Dispute Resolution Process or court proceedings.

4. Where NHS England determines that a contract or agreement should be terminated with immediate effect, the AT shall serve notice of termination in writing on the contractor terminating the contract or agreement immediately in accordance with the details set out in sub paragraph 3 above.

5. Where NHS England determines that the contract or agreement should be allowed to continue for an interim period, the AT should serve written notice on the contractor confirming the arrangements as set out in sub paragraph 3 above.

6. When issuing a notice of termination it is essential that the AT retains a record that the contractor has received the notice and the date of its delivery. This can be achieved either by hand delivery of the notice upon which the contractor should be asked to sign a Received Receipt (Annex 3), or by recorded or special delivery arrangements through the Royal Mail, when all tracking records must be retained on file.

76. NHS England becomes legally responsible for ensuring continuity and provision of primary medical services to patients previously registered under the terminated contact and, unless the list is terminated the TUPE issues relating to staff pass to the new contractor whether temporary or permanent.

Terminations relating solely to PMS Agreements.

77. There are two additional rights to terminate under PMS, which do not exist under GMS:

- by either party on notice[17] ; and
- by the contractor when they exercise their right to transfer to a GMS contract.

1. Termination on notice

[17] *PMS Agreement Regulations, Schedule 5,Part 8, 100*

78.
a. The contractor or NHS England may terminate the agreement by serving notice in writing on the other party at any time.
b. Where a notice is served in this respect, and the period of notice in relation to such termination (which must be a period of not less than six months) has previously been agreed between the parties and provided for in the agreement, the date of termination under the notice must be calculated in accordance with such agreed period of notice, and the agreement will terminate on the date calculated.
c. Where a notice is served in this respect, and no period of notice has previously been agreed between the parties and provided for in the agreement in relation to such termination, the period of notice required must be six months and the date of termination under the notice must be calculated accordingly, and the agreement will terminate on the date calculated.

79. Neither party, in respect of PMS, needs to establish a contractual or performance reason for the termination, whereas under GMS it is only the contractor that can terminate on notice alone.

80. The grounds for termination under this section could simply be the financial viability of the contract for either party and has been used consistently by previous commissioning organisations after having completed a full review of their PMS contracts. Notice was provided that the existing agreements would be terminated and contractors were offered the opportunity to enter into a new PMS agreement or exercise their rights to return to GMS.

81. Whilst there is no requirement to establish contractual reasons, NHS England would likely need to demonstrate their reasoning behind such a move, consult on the potential implications with patients, public, Overview and Scrutiny and LMC representatives and establish the terms for any new agreement ready for consideration as part of that process.

82. A contract is a joint agreement between parties that obliges both sides to adhere to the terms and requires that all parties act reasonably in fulfilling their obligations.

2. Termination of a PMS agreement when the contractor exercises their right to a GMS contract.

83. This right is conferred under the regulations to PMS[18] agreement holders only. Whilst the PMS Regulations are also the main basis for the

[18] *PMS Agreement Regulations, Part 6*

development of APMS and SPMS agreements, neither of these forms of agreement shall include any such right to a GMS contract.

84. 1. A PMS contractor which is providing essential services and which wishes a general medical services contract to be entered into should notify NHS England AT in writing at least three months before the date on which it wishes the general medical services contract to be entered into.

85. Whilst it is not a requirement of the regulations, when the AT receive such a notice it is recommended that they discuss the full implications of this action with the contractor to ensure that they have fully understood the necessary changes to the contractual income streams (see paragraph 9 of this section)

86. Further details in this respect are set out in the policy for Managing a Personal Medical Services contractors' right to a General Medical Services contract

Key considerations on termination:

87. Some of the key actions to be addressed when managing the termination of the contract are:

a. Premises: who owns them and what arrangements might NHS England need to enter into to secure them for the interim period of consultation, patient list dispersal or procurement,
b. Patient rights of choice: NHS England must not simply transfer all of the registered patients to an alternative provider as they should be provided with a detailed list of other local practices that are currently accepting new patients and offered the opportunity to register with one of them.
c. What steps will be taken in regard to patients who have not registered elsewhere at the end of the contract. It is often the case that the majority will voluntarily seek alternative registration; however, there are usually a number of patients who do not, some of whom may no longer be resident in the UK or simply moved within the UK and not changed their address details at the practice and others who have not yet chosen an alternative provider. Some may have died. In these circumstances NHS England must be clear on the process of dispersal or allocation that they will follow in order to avoid the risk of challenge from other local providers. NHS England should have regard to the Policy on Managing List Inflation for Primary Care in this consideration.

d. IT and other NHS owned equipment - the AT will need to make arrangements to retrieve this following the termination of the contract.
e. Management of NHS patient paper records (Lloyd George notes) and any subsequent clinical mail – it is very likely that the provider has retained a significant number of patient paper records both in the reception area and often stored elsewhere in the practice premises, including loft spaces and store cupboards. NHS England must be able to securely retrieve these records and communications, having full regard of data protection and confidentiality in order that these can be distributed accordingly to any new providers or returned to central storage. The contractor (or their representative) is responsible for any non NHS patient or client record, though agreement may be reached with the AT to manage (dispose of) any confidential information on their behalf.
f. Prescriptions pads, electronic prescriptions and any uncollected completed prescriptions – these will also need to be retrieved and dealt with accordingly. NHS England may wish to decide on a specified age of a current prescription (such as one month) and make appropriate arrangements for the handling of these and disposal of any that are older.
g. Practice held drugs – these will need to be disposed of but are technically likely to be owned by the contractor whose contract is terminating. NHS England should seek assurances about the safe and effective disposal of such drugs.

88. This list is not exhaustive and there are likely to be other issues that need due consideration under these provisions. These considerations, however, will also apply following the sudden death of a contractor (see the Policy on Managing the Death of a Contractor for primary medical services) and in some part on the closure of a branch surgery (see Managing a branch closure for primary medical services).

Annex 1: abbreviations and acronyms

A&E	accident and emergency

APHO	Association of Public Health Observatories (now known as the Network of Public Health Observatories)
APMS	Alternative Provider Medical Services
AT	area team (of NHS England)
AUR	appliance use reviews
BDA	British Dental Association
BMA	British Medical Association
CCG	clinical commissioning group
CD	controlled drug
CDAO	controlled drug accountable officer
CGST	NHS Clinical Governance Support Team
CIC	community interest company
CMO	chief medical officer
COT	course of treatment
CPAF	community pharmacy assurance framework
CQC	Care Quality Commission
CQRS	Calculating Quality Reporting Service (replacement for QMAS)
DAC	dispensing appliance contractor
Days	calendar days unless working days is specifically stated
DBS	Disclosure and Barring Service
DDA	Disability Discrimination Act
DES	directed enhanced service
DH	Department of Health
EEA	European Economic Area
ePACT	electronic prescribing analysis and costs
ESPLPS	essential small pharmacy local pharmaceutical services
EU	European Union
FHS	family health services
FHS AU	family health services appeals unit
FHSS	family health shared services
FPC	family practitioner committee
FTA	failed to attend
FTT	first-tier tribunal
GDP	general dental practitioner
GDS	General Dental Services
GMC	General Medical Council
GMS	General Medical Services
GP	general practitioner
GPES	GP Extraction Service
GPhC	General Pharmaceutical Council

GSMP	global sum monthly payment
HR	human resources
HSE	Health and Safety Executive
HWB	health and wellbeing board
IC	NHS Information Centre
IELTS	International English Language Testing System
KPIs	key performance indicators
LA	local authority
LDC	local dental committee
LETB	local education and training board
LIN	local intelligence network
LLP	limited liability partnership
LMC	local medical committee
LOC	local optical committee
LPC	local pharmaceutical committee
LPN	local professional network
LPS	local pharmaceutical services
LRC	local representative committee
MDO	medical defence organisation
MHRA	Medicines and Healthcare Products Regulatory Agency
MIS	management information system
MPIG	minimum practice income guarantee
MUR	medicines use review and prescription intervention services
NACV	negotiated annual contract value
NCAS	National Clinical Assessment Service
NDRI	National Duplicate Registration Initiative
NHAIS	National Health Authority Information System (also known as Exeter)
NHS Act	National Health Service Act 2006
NHS BSA	NHS Business Services Authority
NHS CB	NHS Commissioning Board (NHS England)
NHS CfH	NHS Connecting for Health
NHS DS	NHS Dental Services
NHS LA	NHS Litigation Authority
NMS	new medicine service
NPE	net pensionable earnings
NPSA	National Patient Safety Agency
OJEU	Official Journal of the European Union
OMP	ophthalmic medical practitioner
ONS	Office of National Statistics
OOH	out of hours

PAF	postcode address file
PALS	patient advice and liaison service
PAM	professions allied to medicine
PCC	Primary Care Commissioning
PCT	primary care trust
PDS	personal dental services
PDS NBO	Personal Demographic Service National Back Office
PGD	patient group direction
PHE	Public Health England
PLDP	performers' list decision panel
PMC	primary medical contract
PMS	Personal Medical Services
PNA	pharmaceutical needs assessment
POL	payments online
PPD	prescription pricing division (part of NHS BSA)
PSG	performance screening group
PSNC	Pharmaceutical Services Negotiating Committee
QOF	quality and outcomes framework
RCGP	Royal College of General Practitioners
RO	responsible officer
SEO	social enterprise organisation
SFE	statement of financial entitlements
SI	statutory instrument
SMART	specific, measurable, achievable, realistic, timely
SOA	super output area
SOP	standard operating procedure
SPMS	Specialist Personal Medical Services
SUI	serious untoward incident
UDA	unit of dental activity
UOA	unit of orthodontic activity

Annex 2: Example Remedial Notice

This annex is provided as an example only and ATs should ensure that they have sought appropriate advice and support, in line with NHS England protocols, prior to issuing such a notice.

Dear [*Name*]

Remedial Notice

Following our recent communications and discussion on the [insert date(s), we hereby serve notice that NHS England considers you are in breach of your (GMS/PMS/APMS)*delete as appropriate contract/agreement dated *[insert start date of contract]* on the following grounds:

[insert bullet points setting out the breach details and referencing clause numbers from contract]
[Insert details of any evidence relied upon in reaching this decision]

In accordance with schedule 6 part 8, regulation 115 of the NHS (GMS contract) regulations 2004,(schedule 5, regulation 107 of the PMS Agreement Regulations 2004)*delete where appropriate NHS England requires you to remedy this breach by taking the following steps:

[insert details of action required]

In order to remedy this breach this action must be completed to the satisfaction of NHS England on or before [*insert date*]

[The notice period shall, unless NHS England *is satisfied that a shorter period is necessary to*

- *protect the safety of the contractor's patients; or*
- *protect itself from material financial loss*

be no less than 28 days from the date of this notice]

Your progress in taking the required action will be reviewed at a further meeting on the *[insert date]* to be held at *[insert venue details]*

If you fail to comply with this notice, repeat this breach or otherwise breach the contract resulting in further breach notices being issued, the NHS England may take steps to terminate your contract or consider the imposition of a contract sanction.

Should you wish to appeal against this decision, you must do so in writing to *[insert details of appeal contact address]* within a maximum of 28 days from the date of service of this notice and you do, of course, retain the right to seek support from your Local Medical Committee.

Yours sincerely,

[Name]
[Job title – NHS England etc.]

Annex 3: Notice Receipt

NB: ATs should complete this receipt in duplicate ensuring that one copy of the completed document is retained by the contractor and the other retained on NHS England AT file, when hand delivering any notice under the contract

NHS England reference:

DATE

I *[insert name of NHS* England *AT representative]* confirm that I have today at *[insert the time of delivery]* hand delivered a letter of notice to *[insert contractors name]* in respect of their primary medical services contract on behalf of the NHS England Area Team, *[insert address of AT offices]*

Please ensure that the recipient completes the section below upon receipt:

I, *[insert name of contract holder]* hereby acknowledge receipt of a hand delivered letter of notice from NHS England in respect of my *[GMS/PMS/APMS]* contract.

Signature……

Date of receipt……..

Practice Stamp

Annex 4: Example remedial notice satisfied letter

This annex is provided as an example only and ATs should ensure that they have sought appropriate advice and support, in line with NHS England protocols, prior to issuing such a letter.

Dear [*Name*]

Remedial Notice Satisfied

Following the issue of our remedial notice reference *[insert NHS England ref from notice]* on the *[insert date],* in respect of your (GMS/PMS/APMS)*delete as appropriate and our subsequent review meeting on the *[insert date],* we now write to confirm that you have taken the required steps to satisfy NHS England that this breach has been remedied within the agreed timescales.

NHS England now confirm that we will not be taking any further action in this matter, however, would advise that, should you repeat this breach or otherwise breach the contract resulting in further remedial or breach notices being issued, NHS England may take steps to issue a notice to terminate your contract or consider the imposition of a contract sanction.

Yours sincerely,

[Name]
[Job title – NHS England *etc.]*

Annex 5: Example Breach Notice

This annex is provided as an example only and ATs should ensure that they have sought appropriate advice and support, in line with NHS England protocols, prior to issuing such a notice.

Dear [*Name*]

Breach Notice

Following our recent communications and discussion on the *[insert date(s)],* we hereby serve notice that the NHS England considers you are in breach of your (GMS/PMS/APMS)*delete as appropriate contract dated *[insert start date of contract]* on the following grounds:

[insert bullet points setting out the breach details and referencing clause numbers from contract]
[Insert details of any evidence relied upon in reaching this decision]

In accordance with schedule 6 part 8, regulation 115 of the NHS (GMS contract) regulations 2004, (schedule 5, regulation 107 of the PMS Agreement Regulations 2004)*delete where appropriate NHS England requires that you do not repeat this breach.

If you fail to comply with this notice in that you repeat this breach or otherwise breach the contract resulting in a remedial notice or a further breach notice being issued, NHS England may take steps to terminate your contract or consider the imposition of a contract sanction.

Should you wish to appeal against this decision, you must do so in writing to *[insert details of appeal contact address]* within a **maximum of 28 days** from the date of service of this notice and you do, of course, retain the right to seek support from your Local Medical Committee.

Yours sincerely,

[Name]
[Job title – NHS England, etc]

Annex 6: Calculating a financial Sanction

One example of where a financial sanction might be an appropriate action to take would be where a contractor had repeatedly failed to deliver an additional service, such as childhood immunisation. Whilst a repeat of any such failure, following notices, would be a breach of contract and NHS England would be entitled to seek termination on those grounds, it may find it more proportionate to apply one of the three sanctions available to them.

If NHS England were to choose to apply a financial sanction it should be able to calculate the cost of re-provision of that service for the registered population from another provider and would be able to refer to the SFE in order to calculate the appropriate deduction from the contract value and payments.

It would be these calculations that might suggest an appropriate level of financial sanction in respect of this particular breach example.

Some other examples of calculating a financial sanction are provided below for consideration-

- the higher of the cost of re-provision and the contractual cost- where the breach is on-going and a contract service cost can be quantified
- the contractual service cost - where the breach has been remedied and the service cost can be quantified
- Plus in both cases the cost to NHS England in management time involved in investigating and processing the breach.

Where the contract service cannot be quantified

- the cost to NHS England in management time involved in investigating and processing the breach.

NHS England cannot arbitrarily determine a penalty sum so any calculation should be consistent across the country to ensure equity and resilience to the process.

This should all be applied in a reasonable manner. The hourly £'s for management time should be set out in advance where possible.

Annex 7: Example Notice of Sanction

This annex is provided as an example only and ATs should ensure that they have sought appropriate advice and support, in line with NHS England protocols, prior to issuing such a notice.

Dear [*Name*]

Notice of Sanction

Further to our recent communications and discussion on the *[insert date(s)],* NHS England would advise that we are now in a position where we would be entitled to serve notice to terminate your (GMS/PMS/APMS)*delete as appropriate contract dated *[insert start date of contract]* on the following grounds:

[insert bullet points setting out the breach details and referencing clause numbers from contract]
[Insert details of any evidence relied upon in reaching this decision]
[insert full details of all previous notices issued and subsequent actions taken and outcomes]

However, in accordance with schedule 6 part 8, regulation 117 of the NHS (GMS contract) regulations 2004 (schedule 5, regulation 109 of the PMS Agreement Regulations 2004)*delete where appropriate NHS England has instead taken the decision to impose a contract sanction.

In accordance with the regulations a Contract sanction means –

a. termination of specified reciprocal obligations under the contract;
b. suspension of specified reciprocal obligations under the contract for a period of up to six months; or
c. withholding or deducting monies otherwise payable under the contract.

NHS England has decided to impose sanction *[(a)(b)(c)]* * delete as appropriate and are reasonably satisfied that the contract sanction to be imposed is appropriate and proportionate to the circumstances giving rise to NHS England's entitlement to terminate the contract.

The details of this sanction are:

*[insert the details and the effect of the sanction – either termination or suspension of reciprocal obligations, i.e. additional, enhanced services (this **must not** include any part of Essential Services)etc. or details of any calculations in respect of a financial sanction and duration of any such sanction]*

In accordance with the regulations this sanction will be imposed on the *[insert date]* and *[if appropriate]* will terminate on the *[insert date].*

Should you wish to appeal against this decision, you must do so in writing to *[insert details of appeal contact address]* within a **maximum of 28 days** from the date of service of this notice and you do, of course, retain the right to seek support from your Local Medical Committee.

Yours sincerely,

[Name]
[Job title – NHS England, etc.]

Annex 8: Eligibility to hold a primary medical services contract

The information provided in this annex is a summary of the regulatory provisions and ATs should ensure that they refer to the full detail of the regulations or directions when considering eligibility and/or suitability.

The following section offers a summary of the legal requirements surrounding eligibility for primary medical services contracts and full details of Regulation 4 and 5 of the GMS Contract Regulations 2004, but does not replicate the full legal text. This guide can only offer a broad introduction. Anyone entering into, or seeking, a primary medical services contract should refer directly to the relevant legislation, or seek independent legal advice.

Potential contractors should also be aware that, in addition to the requirements on eligibility, there are further requirements across all contracting routes to ensure that the persons entering into the contract with NHS England are fit and proper e.g. they have not been adjudged bankrupt or have certain types of criminal record.

1. GMS Contractors

GMS contracts can be made with:

- A general medical practitioner;
- Two or more individuals practising in partnership;
  - At least one partner (who must not be a limited partner) must be a general medical practitioner; and
  - Other partners must be individuals from within the 'NHS family'.
- Company limited by shares:
  - At least one share must be legally and beneficially owned by a general medical practitioner;
  - All other shares must be legally and beneficially owned by a general medical practitioner or a person who could enter into a GMS contract as part of a partnership.

In this context, 'NHS family' means:

- Medical practitioners;
- Healthcare professionals;

GMS providers or their employees;
PMS providers or their employees; or
Employees of NHS Trusts or Foundation Trusts.

It is important to note that 'healthcare professionals' is not restricted to employees of the NHS. It is a broad definition that includes persons registered with the professional bodies set out in legislation (provided that such professionals are engaged in the provision of services under the NHS Act). It can therefore include doctors, nurses, professions allied to medicine (PAMs), pharmacists, dentists, osteopaths, chiropractors and others.

2. PMS (and SPMS) Contractors

PMS agreements can be entered into with one or more of the following:

A medical practitioner;
A healthcare professional;
An individual who is a GMS or PMS provider;
An NHS employee, a GMS employee or a PMS employee;
An NHS trust, NHS foundation trust,
A qualifying body (a company limited by shares, all of which are legally and beneficially owned by persons who may enter a PMS agreement as identified above).

Contractors should note that NHS England may not enter into PMS agreements with partnerships. The PMS agreement is made with the individuals themselves, who may then choose to deliver their contractual obligations by means of a partnership.

3. APMS Contractors

In principle, there are no restrictions on the types of organisations that may hold contracts under APMS arrangements. NHS England can enter APMS contracts with any individual or organisation that meets the provider conditions set out in Directions.

Regulations 4 & 5[19]

4. Conditions relating solely to medical practitioners

[19] *GMS Contract Regulations*

1. In the case of a contract to be entered into with a medical practitioner, that practitioner must be a general medical practitioner.

2. In the case of a contract to be entered into with two or more individuals practising in partnership -
   a. at least one partner (who must not be a limited partner) must be a general medical practitioner; and
   b. any other partner who is a medical practitioner must -
      i. be a general medical practitioner, or
      ii. be employed by a Primary Care Trust, Local Health Board, (in England and Wales and Scotland) NHS Trust, an NHS Foundation Trust, (in Scotland) a Health Board or (in Northern Ireland) a Health and Social Services Trust.

3. In the case of a contract to be entered into with a company limited by shares -
   a. at least one share in the company must be legally and beneficially owned by a general medical practitioner; and
   b. any other share or shares in the company that are legally and beneficially owned by a medical practitioner must be so owned by
      i. a general medical practitioner, or
      ii. a medical practitioner who is employed by a Primary Care Trust, Local Health Board, NHS Trust, (in England and Wales and Scotland) an NHS Foundation Trust, (in Scotland) a Health Board or (in Northern Ireland) a Health and Social Services Trust.

4. In paragraphs (1), (2)(a) and (3)(a), **general medical practitioner** does not include a medical practitioner whose name is included in the General Practitioner Register by virtue of -
   a. article 4(3) of the 2010 Order (general practitioners eligible for entry in the General Practitioner Register) because of an exemption under regulation 5(1)(d) of one or more of the sets of Regulations specified in paragraph (5);
   b. article 6(2) of the 2010 Order (persons with acquired rights) by virtue of being a restricted services principal (within the meaning of one or more of the sets of Regulations specified in paragraph (6)) included in a list specified in that article; or
   c. article 6(6) of the 2010 Order.
5. The regulations referred to in paragraph (4)(a) are the National Health Service (Vocational Training for General Medical Practice) Regulations

1997, the National Health Service (Vocational Training for General Medical Practice) (Scotland) Regulations 1998 and the Medical Practitioners (Vocational Training) Regulations (Northern Ireland) 1998.

6. The Regulations referred to in paragraph (4)(b) are the National Health Service (General Medical Services) Regulations 1992, the National Health Service (General Medical Services) (Scotland) Regulations 1995 and the General Medical Services Regulations (Northern Ireland) 1997.

5. General condition relating to all contracts

1. It is a condition in the case of a contract to be entered into -
   a. with a medical practitioner, that the medical practitioner;
   b. with two or more individuals practising in partnership, that any individual or the partnership; and
   c. with a company limited by shares, that -
      i. the company,
      ii. any person legally and beneficially owning a share in the company, and
      iii. any director or secretary of the company,

   must not fall within paragraph (2).

2. A person falls within this paragraph if -
   a. he or it is the subject of a national disqualification;
   b. subject to paragraph (3), he or it is disqualified or suspended (other than by an interim suspension order or direction pending an investigation) from practising by any licensing body anywhere in the world;
   c. within the period of five years prior to the signing of the contract or commencement of the contract, whichever is the earlier, he has been dismissed (otherwise than by reason of redundancy) from any employment by a health service body, unless he has subsequently been employed by that health service body or another health service body and paragraph (4) applies to him or that dismissal was the subject of a finding of unfair dismissal by any competent tribunal or court;
   d. within the period of five years prior to signing the contract or commencement of the contract, whichever is the earlier, he or it has been removed from, or refused admission to, a primary care list by reason of inefficiency, fraud or unsuitability (within the meaning of section 49F(2), (3) and (4) of the Act respectively unless his name has subsequently been included in such a list;
   e. he has been convicted in the United Kingdom of murder;
   f. he has been convicted in the United Kingdom of a criminal offence other than murder, committed on or after 14th December 2001, and has been sentenced to a term of imprisonment of over six months;
   g. subject to paragraph (5) he has been convicted elsewhere of an offence -
      i. which would, if committed in England and Wales, constitute murder, or

ii. committed on or after 14th December 2001, which would if committed in England and Wales, constitute a criminal offence other than murder, and been sentenced to a term of imprisonment of over six months;

h. he has been convicted of an offence referred to in Schedule 1 to the Children and Young Persons Act 1933 (offences against children and young persons with respect to which special provisions of this Act apply) or Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under the age of 17 years to which special provisions apply) committed on or after 1st March 2004;

i. he or it has -
   i. been adjudged bankrupt or had sequestration of his estate awarded unless (in either case) he has been discharged or the bankruptcy order has been annulled,
   ii. been made the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order under Schedule 4A to the Insolvency Act 1986 or Schedule 2A to the Insolvency (Northern Ireland) Order 1989 unless that order has ceased to have effect or has been annulled, or
   iii. made a composition or arrangement with, or granted a trust deed for, his or its creditors unless he or it has been discharged in respect of it;

j. an administrator, administrative receiver or receiver is appointed in respect of it;

k. within the period of five years prior to signing the contract or commencement of the contract, whichever is the earlier, he has been -
   i. removed from the office of charity trustee or trustee for a charity by an order made by the Charity Commissioners or the High Court on the grounds of any misconduct or mismanagement in the administration of the charity for which he was responsible or to which he was privy, or which he by his conduct contributed to or facilitated, or
   ii. removed under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (powers of the Court of Session to deal with management of charities) or under section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (powers of Court of Session), from being concerned in the management or control of any body; or

l. he is subject to a disqualification order under the Company Directors Disqualification Act 1986, the Companies (Northern Ireland) Order

1986 or to an order made under section 429(2)(b) of the Insolvency Act 1986 (failure to pay under county court administration order).

3. A person shall not fall within paragraph (2)(b) where the Primary Care Trust is satisfied that the disqualification or suspension from practising is imposed by a licensing body outside the United Kingdom and it does not make the person unsuitable to be -
   a. a contractor;
   b. a partner, in the case of a contract with two or more individuals practising in partnership;
   c. in the case of a contract with a company limited by shares -
      i. a person legally and beneficially holding a share in the company, or
      ii. a director or secretary of the company,

   as the case may be.
4. Where a person has been employed as a member of a health care profession any subsequent employment must also be as a member of that profession.
5. A person shall not fall within paragraph (2)(g) where the Primary Care Trust is satisfied that the conviction does not make the person unsuitable to be -
   a. a contractor;
   b. a partner, in the case of a contract with two or more individuals practising in partnership;
   c. in the case of a contract with a company limited by shares -
      i. a person legally and beneficially holding a share in the company, or
      ii. a director or secretary of the company,

   as the case may be.

Annex 9: Criteria for consideration of commissioning opportunities in relation to the termination of a contract.

ALL OPTIONS NEED TO BE CONSIDERED IN LINE WITH LOCAL AREA STRATEGY DOCUMENTS

The majority of the measures identified in the dispersal option would also need to be collected for the purposes of consideration of any option under this proforma in order to fully consider all implications.

OPTION 1: DISPERSAL

Issues for Consideration	Comments
Current List size of terminating contract and historical for past 12 months including age ranges	Data to be provided by FHS services
Local Capacity (radius to be determined with each case)	To be assessed considering number of other local practices, capacity, list status (open/closed), patient choice etc.
Geographical Location	Map to be with surrounding practices, pharmacies, care homes identified (radius to be determined with each case). To identify access barriers, public transport links, proposed new developments etc.
Impact on Other Primary Care Providers (Pharmacies, Community Services, Practices)	
Premises Ownership	Is this an NHS owned premises, what is the intention in respect of continued use, sale, lease etc.

Practice employed staff	NHS England has no responsibilities in respect of the staff employed under a terminating contract. The Contractor (or his representative) is solely responsible for the management of employees.
Value for Money	Dispersal of patients may result in a number of them being charged at a higher or lower rate than the existing contracted value. Need to factor in that newly registered patients under GMS attract a higher CWP during their first year of new registration at alternative practices.
Deprivation Factors	Consider the weightings applied for each of the other local practices and consider the cost implications of dispersal
Population Makeup	To include specifics such as elderly, students, young families, commuters, ethnicity
Specific Specialised Services Currently Commissioned (enhanced services)	Will patient services at alternative practices be affected as they may not deliver the same enhanced services as the existing provider – what additional obligations might this result in for the NHS England in ensuring access to these services for the population?
Viability of Option	To be completed by individual reviewer once assessed option
Preferred Option Why?	Yes/No

OPTION 2: Short term contract in order to complete consultation and procurement processes

Issues for Consideration	Comments
Current List size of terminating contract and historical for past 12 months including age ranges	Data to be provided by FHS services
Current practice capacity	Is there room for the practice list to grown under any caretaking arrangements or should the list be closed for the duration, allowing for natural reduction in list size.
Premises Ownership	Are the current premises suitable for the short term (maximum 12 months) delivery of services to this population and if so what arrangements need to be agreed in order for any caretaking provider to retain access to these premises? Who is the owner/landlord?
Value for Money	Short term contracting arrangements may cost additionally over the existing contract value.
Population Makeup	To include specifics such as elderly, students, young families, commuters, ethnicity. Any caretaking provider should be aware of these influencing factors at the earliest opportunity in order to source the right people for the service.
Specific Specialised Services Currently Commissioned (enhanced services)	Patient services should not be affected by any caretaking provisions, it is therefore essential to ensure that any provider has the skills and capabilities to deliver such services.
TUPE	If NHS England is to reward a short term contract to an alternative provider organisation what responsibilities may need to be considered in respect of the staff currently employed under the terminating contract. The NHS England must, if

	TUPE applies, support the transition of any applicable staff though will not have TUPE responsibilities themselves. TUPE can be complex, risky and time consuming for any incoming provider and is likely to have a financial impact on the cost of any such services. Not least to cover any subsequent redundancy costs of the TUPE'd staff etc. It is unlikely that any short term provider would wish to take on any such responsibilities and must be considered a significant risk to any caretaking arrangements.
NHS England processes throughout arrangements	1) As the commissioner of the caretaking arrangements NHS England shall want to ensure that robust performance management arrangements are in place for the duration. 2) It should be made clear what the intentions are for the caretaking period, i.e. what will happen at the end of the 12 month period? This needs to be agreed in advance and contractual terms strengthened, i.e. exit plan and obligation to cooperate, etc. 3) Consider the implications of any caretaking provider winning a tender for the new services i.e. challenges on the basis of unfair advantage/preferential treatment etc.. 4) What form of contract will you seek to procure services under? This will affect the possible applicants but may exclude the caretaking provider. 5) Proceed with procurement process
Viability of Option	To be completed by individual reviewer once assessed option
Preferred Option Why?	Yes/No

OPTION 3: PROCUREMENT – This option could be considered as the second stage of option 2 or be a stand-alone process given sufficient notice periods.

Full details of consideration and processes for procurement are as set out in the *Policy for managing procurement for primary care services.*

Issues for Consideration	Comments
Current and any future planned list size growth for new provider	Historical data to be provided on list variations.
Nature of Contract	What type of contract will the procurement be for and what length (if APMS) will the contract be for. This is the commissioners' decisions and may technically restrict the nature and number of possible bidders for the service.
Geographical Location	Is the procurement to secure delivery of services within the same locality as the outgoing provider or is the intention for bidders to secure an alternative, geographically placed premises.
Impact on Other Primary Care Providers (Pharmacies, Community Services, Practices)	
Premises	Would the commissioner require any service provider to be located in a new NHS building or secure their own. What would the minimum requirements of any new providers premises need to be, i.e. fully compliant with current legislation etc. what would be the cost implications on the NHS (rental reimbursements, Facilities management costs, etc.)
Value for Money	NHS England would want to ensure that they are able to achieve VFM from any new provider and should agree a financial envelope in which they would consider bids prior to the procurement process. If a list growth is required as part of the new contract then NHS England should ensure that terms setting out the financial implications of

	growth and reduction are included. NHS England may consider including services which currently attract additional funding as part of core contract for this procurement. NHS England will want to include KPIs for key strategic targets which reward on achievement and include sanctions for failure (not suitable under GMS contracting routes)
Population Makeup	NHS England may consider including specific service requirements for specific target groups, e.g. elderly, students, young families, commuters, ethnicity
Viability of Option	To be complete by individual reviewer once assessed option
Preferred Option Why?	Yes/No

This list is by no means exhaustive and is meant as a guide only.

All terminations should be given full consideration and the local impact assessed thoroughly prior to NHS England taking action, where appropriate to do so.

Version control tracker

Version Number	Date	Author Title	Status	Comment/Reason for Issue/Approving Body
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