NHS foundation trusts: Changes to the Private Patient Income cap

22 DECEMBER 2008

Alison Paines
PARTNER | UK

CATEGORY:
ARTICLE

1. Background

The point in issue is Monitor’s interpretation of the legal basis (National Health Service Act 2006, section 44 – NHS foundation trusts’ income from private patient charges must not exceed the proportion of their income earned from this source in 2002/03) of the cap. The average PPI cap is 1.5%.

In February 2008, the public sector union, UNISON, sought judicial review of Monitor’s legal interpretation of the PPI cap, arguing that Monitor’s rules contained a loophole enabling foundation trusts to do unlimited amounts of private work by establishing joint ventures with private companies and by setting up charitable organisations. This challenge prompted a formal consultation in June 2008.

2. Recap on the consultation

In its consultation document, Monitor put forward three options for the application of the PPI cap:

2.1 Retaining the existing approach – i.e. including only income directly derived from the provision of goods and services to private patients;

2.2 Retaining the existing approach, but extending the definition of PPI to include private patient charges for goods and services provided by associate and joint venture arrangements; and

2.3 Extending option 2 to include three additional sources, for example donations from charities where the donation was funded by private patient charges made by the charity.

3. Providers’ responses

UNISON argued that the only lawful approach was option 3: extending the cap to include any income ultimately derived from private patient charges, even if the foundation trust has not supplied the services.

Overall, however, there was substantial support for Monitor’s existing approach – 51 of the 53 foundation trusts that responded considered the first option to be the most appropriate.

4. Monitor’s response

Nevertheless, Monitor has decided to implement option 2. The definition of PPI, which appears in Monitor’s rules, as set out in the financial reporting manual, will therefore be extended. The new definition will include the relevant proportion of any income from private patient charges for goods and services provided by associate and joint venture arrangements.

Monitor regards the second option as a logical extension of its current approach, and capable of leading to a clear set of rules. In contrast, it views UNISON’s proposal as unworkable.

5. Effect of the consultation

NHS foundation trusts must consider past, present and future joint venture or associate arrangements:

5.1 If an NHS foundation trust was involved in joint venture or associate arrangements in relation to private healthcare in 2002/2003, the proportion of its income earned from private patient charges in 2002/2003 needs to be recalculated to reflect this.

5.2 If an NHS foundation trust is concerned that including income from existing joint venture and associate arrangements could lead it to breach its PPI cap, it should contact Monitor, which will agree a plan to balance compliance with the cap against compliance with contractual obligations.
and to minimise disruption to patient care.

5.3 From now on (and effective from 12 December 2008), if an NHS foundation trust enters into a joint venture or associate arrangement, it must include any private patient income in its calculation of PPI from 1 April 2009, and comply with its PPI cap in 2009/2010.

6. Conclusion

NHS foundation trusts should consider any joint venture or associate arrangements in light of Monitor’s new, more restrictive, approach to the PPI cap. However, given that this approach is still subject to legal challenge, it will also be important to acknowledge that there may be further changes.

In the meantime, for NHS foundation trusts with separate but associated charities, because the most restrictive option (option 3 above) has not been adopted, there may still be scope for structuring the provision of private patient services in a way which will enable income to be earned and ultimately benefit the NHS foundation trust, without its being included in the PPI cap.

For further information, or to discuss this matter in relation to your specific circumstances, please contact Alison Paines on +44 (0)20 7597 6057 or alison.paines@withersworldwide.com.
Authors

Alison Paines
PARTNER | LONDON
Charities
📞 +44 20 7597 6057
✉️ alison.paines@withersworldwide.com