

Cooperation and Competition Panel

**Draft interim guidance on
advertising and misleading information dispute appeals
and referrals in the promotion of NHS-funded services**

January 2009

1. Introduction

- 1.1. There has been extensive Government investment in the NHS since 2000. During the same period, the NHS has moved from a system model based on control of the means of provision, towards a more open system with a defined division of roles between commissioners and service providers. The catalyst for change was the desire to make patient needs the main focus of the NHS.
- 1.2. For routine elective services patients now have the right to a 'free choice' of provider¹. This means that patients can choose any willing and registered provider of these services when they require a referral for a first, consultant led outpatient appointment – regardless of physical proximity or type of provider. The NHS is also moving towards a more competitive (or contestable²) model in the procurement of health services as well as through patient choice. Competition, including through service contestability, encourages innovation, quality and responsiveness to patient needs.
- 1.3. Competition and choice are powerful levers to drive up service quality, deliver better value and reduce inequalities. Yet they can only be effective if there are clear, enforceable rules guiding and governing behaviour within the healthcare system.
- 1.4. To address this need, the Department of Health (DH) published the *Principles and Rules for Cooperation and Competition*³ (Principles and Rules) as part of the *NHS Operating Framework 2008/09 – 2010/11*.⁴ Their purpose is to ensure fair and transparent competition to best utilise resources and enable innovation, and provide essential safeguards for the interests of patients, taxpayers, and the reputation of the NHS.
- 1.5. The Cooperation and Competition Panel (the Panel) helps ensure that the Principles and Rules in the provision of NHS-funded services support the delivery of high quality care for patients and value for money for taxpayers. It investigates potential breaches of the Principles and Rules, and makes independent recommendations to DH, Strategic Health Authorities (SHAs) and Monitor⁵ on how such breaches should be resolved. It also reviews proposed mergers, and advises on the wider development of cooperation and competition within the NHS. In carrying out its responsibilities, the Panel works with all parts of the NHS, the independent sector and others to drive improvements in service delivery.
- 1.6. These guidelines deal specifically with the Panel's responsibilities in relation to administering the Principles and Rules relevant to the promotional of NHS funded services. More detail on the Panel's wider responsibilities are provided on the Panel's website at www.ccpanel.org.uk.

¹The NHS Constitution (Department of Health; January 2009)

²In economics a contestable market is one in which an incumbent faces strong competitive constraints from potential competitors because low barriers to entry and exit constrain an incumbent's ability to take advantage of their position. In the context of this document, however, we use the term 'contestability' to refer more generally to services where a commissioner may have the option of contracting with alternative service providers.

³The Principles and Rules are available at www.ccpanel.org.uk.

⁴For more information, please see *NHS Operating Framework 2008/09*.

⁵Monitor is the independent regulator of Foundation Trusts.

The Panel's role in relation to promotional activity

- 1.7. For patients to exercise choice effectively they need to have accurate information about services. Access to high-quality information on which to base choice will improve the quality of services, as patient choose the service that best fits their needs. The *Code of Practice for the Promotion of NHS Funded Services*⁶ (the Code) sets out rules that equally apply to all providers of NHS commissioned services. The Code is intended to ensure that promotional material is accurate and fair, to protect patients, the public and referring clinicians from misleading or offensive material. The Principles and Rules state that advertisers of NHS funded services must adhere to this Code.
- 1.8. The Panel's role in relation to alleged breaches of the Code is twofold:
 - (i) firstly, it plays an advisory role to SHAs and PCTs where a matter cannot be resolved locally; and
 - (ii) secondly, it acts as an appellant body in relation to decisions taken by PCTs and SHAs.
- 1.9. In the first instance, individuals or organisations should direct complaints relating to compliance with the Code to their local PCT. PCTs may be able to resolve complaints locally, through discussion with the provider(s) in question, with the support of their SHA.
- 1.10. Where disputes cannot be resolved at a local level, the PCT or SHA may refer the matter to the Panel for adjudication. The Panel will also consider appeals of decisions regarding alleged breaches of the Code, subject to the acceptance criteria set out in section three of these guidelines.
- 1.11. The Panel's guidelines on assessment of advertising and misleading information disputes supplement the Rules of Procedure and are designed to provide information to PCTs, NHS Trusts, Foundation Trusts, non-government healthcare providers and other interested parties on the procedures that the Panel will use in considering referrals and appeals. In the event of any conflict between the Rules of Procedure and these guidelines, the Rules of Procedure will take precedence.
- 1.12. The guidelines do not discuss the processes employed by SHAs in considering and deciding on disputes prior to any appeal to the Panel. Each SHA has its own procedures, and more information is available from the website for each SHA (see table 1 below).

⁶For further information, please see *Code of Practice for the Promotion of NHS Funded Services*.

Strategic Health Authority	Information on dispute resolution procedures available at:
East of England	www.eoe.nhs.uk
East Midlands	www.eastmidlands.nhs.uk
London	www.london.nhs.uk
North East	www.northeast.nhs.uk
North West	www.northwest.nhs.uk
South Central	www.southcentral.nhs.uk
South East Coast	www.southeastcoast.nhs.uk
South West	www.southwest.nhs.uk
West Midlands	www.westmidlands.nhs.uk
Yorkshire and the Humber	www.yorksandhumber.nhs.uk

1.13. The following sections of these guidelines set out:

- the policy and legal framework for the Panel's consideration of advertising dispute appeals and referrals (Section 2);
- the acceptance criteria for appeals (Section 3);
- the process by which the Panel will consider advertising dispute referrals and appeals (Section 4);
- recommendations that may be made by the Panel following a successful appeal (Section 5); and
- the content of submissions to be made to the Panel (Section 6).

2. The policy and legal framework

- 2.1. This section sets out the policy and legal framework for the Panel's consideration of advertising and misleading information dispute appeals, including, the rationale for choice and competition in the NHS, the use of advertising as a means of facilitating choice of provider, and the administrative framework for advertising and misleading information dispute appeals.

Promotion of NHS-funded services

- 2.2. In order for patients to effectively exercise choice, patients require information about the different services available. Patients' ability to choose between competing providers is supported by the provision of comparable information about providers through NHS Choices website.⁷
- 2.3. Providers are now also able to advertise or promote their services. The Principles and Rules state that 'appropriate promotional activity is encouraged as long as it remains consistent with patients best interests and the brand and reputation of the NHS'.⁸ This promotional activity is also subject to compliance with the Code. The Code provides specific guidance to providers of NHS-funded services to provide high quality information that will assist patients when deciding on which healthcare services best meet their needs.
- 2.4. The promotion of NHS-funded healthcare services is an effective and important method of informing patients of the different providers and services available to assist them when making choices. Additionally, the effect of promotional activity will encourage providers to customise information about their services available to patients. The publication of information on the quality of services increases transparency and provides an incentive for competition in service improvement.
- 2.5. In general terms, competition can be expected to have numerous beneficial effects: innovation increases, so increasing the quality and, competition can drive efficiency. More generally competition can increase the diversity of choices available so individuals can choose what they would prefer. As set out in the *Framework for Managing Choice, Cooperation and Competition*⁹, choice cooperation and competition in the NHS can be expected to:
- improve quality and safety in service provision;
 - improve health and wellbeing;
 - improve standards and reduce inequalities in access and outcomes;
 - lead to better informed patients;
 - generate greater confidence in the NHS; and
 - provide better value for money.

⁷See <http://www.nhs.uk/ServiceDirectories/Pages/ServiceSearchTreatmentAtoZ.aspx>

⁸Principle 5

⁹For more information, please see the *Framework for Managing Choice, Cooperation and Competition*.

Administrative framework for consideration of Advertising and Misleading Information Dispute Appeals and Referrals by the Panel

- 2.6. Under the Principles and Rules, the Panel is responsible for ensuring that providers of NHS-funded services adhere to the Code. The Principles and Rules relevant to the Panel's responsibilities regarding promotional activity are outlined below in Table 2.¹⁰
- 2.7. In advising on the application of the Principles and Rules in terms of promotional activity, the Panel is responsible for:
 - (i) resolving complaints about promotional activity referred to it by SHAs¹¹; and
 - (ii) hearing appeals on decisions of PCTs and/or SHAs regarding promotional activity.
- 2.8. Disputes over the promotion of NHS funded services should, in the first instance, be taken up with the relevant PCT. Where a PCT is unable to resolve concerns, each SHA has its own dispute resolution process (details of which are available on the relevant SHA website – see Table 1).
- 2.9. Where the local dispute resolution processes are unsuccessful at resolving complaints, SHAs may refer matters to the Panel for adjudication. In adjudicating over complaints relating to advertising or misleading information, the Panel will advise the relevant SHA as to any non-compliance with the overarching Principles and Rules. The Panel's advice in such cases would be copied to DH and, with regard to an NHS Foundation Trusts, to Monitor.
- 2.10. Additionally, where a complainant wishes to contest the outcome of local dispute resolution process, it may ask the Panel to conduct an appeal.

¹⁰The full version of the Principles and Rules is available at www.ccpnl.org.uk

¹¹See, for example, the interim report of *The NHS Next Stage Review (Our NHS, Our Future)*.

Table 2: Principles and Rules relevant to the Panel’s involvement in disputes concerning the promotion of NHS funded services

<p>4. Commissioners and providers should foster patient choice and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare.</p>	<ol style="list-style-type: none"> 1. <i>[omitted – addressed under conduct and procurement dispute guidelines]</i> 2. <i>[omitted – addressed under the guidelines on conduct disputes]</i> 3. Information requirements, NHS Contract clauses 29 and Schedule 5. 4. Conflict of interest declaration, NHS Contract clause 53. 5. <i>[omitted]</i>
<p>5. Appropriate promotional activity is encouraged as long as it remains consistent with patients’ best interests and the brand and reputation of the NHS.</p>	<ol style="list-style-type: none"> 1. PCTs and providers must have regard for the ASA codes which will be supplemented by an NHS Code of Promotion.¹²

NB. The full version of the Principles and Rules of Cooperation and Competition is available at www.ccp-panel.org.uk.

¹²This refers to the NHS Code of Practice for the Promotion of NHS-Funded Services (Code of Practice) as discussed above.

3. Acceptance criteria for referrals and appeals

- 3.1 PCTs and SHAs may refer unresolved disputes relating to the NHS-specific elements of the Code for adjudication by the Panel. In addition, the Panel will consider appeals against the outcome of local dispute resolution relating to alleged breaches of the Code.
- 3.2 The Panel will only consider referrals or appeals regarding promotional activity where the following acceptance criteria have been met:
- (i) The content of the dispute is covered by the Principles and Rules;
 - (ii) There is full and frank disclosure of all relevant and applicable information by either the referring PCT, SHA, or the appellant, including all information as outlined below under Submission Content¹³. This does not preclude the Panel from asking for further information as it requires. Furthermore, any individuals connected to the complaint are on hand to provide further evidence/testimony as required;
 - (iii) Local dispute resolution procedures under the auspices of the relevant SHA have been exhausted;
 - (iv) The Panel is the most appropriate body to consider or resolve the issue (ie over other regulators including the Office of Fair Trading (OFT) and the Advertising Standards Authority (ASA));
 - (v) No legal proceedings have commenced;
 - (vi) The dispute is not trivial, vexatious or an abuse of the Panel's procedures;
 - (vii) Appeals must be made within 25 days of a decision being taken at the local level. Originating complaints must be made within three months of the promotional activity's appearance; and
 - (viii) An appellant must be party to the original dispute now being referred to the Panel on appeal.

¹³See *Submission Content* in section 7 of this document.

4. Process

- 4.1. The Panel will receive matters regarding promotional activities for decision via two avenues:
 - (i) referral from an SHA where, after reviewing the matter from the relevant PCT, it decides that the Panel is better placed to investigate the complaint; or
 - (ii) on appeal from a decision of the relevant SHA.

Referral from SHAs

- 4.2. The Panel may receive complaints referred by SHAs (and/or PCTs) where they consider that they need expert advice on whether a breach of the Principles and Rules has occurred. The following paragraphs outline the process by which the Panel will investigate such referrals. A diagram is attached at Appendix 1 to illustrate this process.
- 4.3. Once the Panel has received a referral from an SHA, it will review the details and confirm that it is the appropriate body to consider the case. The Panel may refer matters to the ASA where it believes the complaint falls within their remit.
- 4.4. If, after initially reviewing the matter, the Panel considers the complaint is frivolous or does not breach the requirement of the Principles and Rules to have regard to the Code, then it will write to the referring SHA or PCT, and relevant Sponsor(s) informing them of the decision. The Panel will conduct this assessment within 10 working days of receiving the referral.
- 4.5. The Panel will publish a Notice of Acceptance on its website where it plans to investigate a complaint. Only once the required information has been received in full will the Notice of Acceptance be published. A complainant may be required to provide a further submission to the extent that it falls short of the 'Submission Content' requirements outlined below.
- 4.6. In the case of referrals from PCTs or SHAs, the Panel will, at the same time as it publishes the Notice of Acceptance, contact the relevant parties to the complaint and inform them that the matter has been referred to the Panel for adjudication.
- 4.7. The Panel will then send a copy of the complaint to the provider in question and request a written response within 10 working days. The Panel requires providers to produce documentary evidence to substantiate all claims that are capable of objective substantiation. In the instance that there is more than one complainant alleging differing breaches, the Panel will send a summary of the complaints and the relevant Code clauses that are alleged to have been breached for response.
- 4.8. The Panel may request further information from parties to the dispute for clarification of facts or issues. The Panel will make such inquiries within 5 days after the closing date for submissions from the promoter.
- 4.9. On receipt of the response and any further written comments or clarification, the Panel will analyse all the information provided and prepare a draft recommendation within 10 working days after the closing of submissions.
- 4.10. The Panel will then send the draft recommendation to the provider and complainant(s)¹⁴ for any comments on the factual accuracy of the

¹⁴In multi-complaint cases where ostensibly the same complaint is made by different parties, only the first few and/or principle complainants are sent the draft recommendation. However, all complaints are fully considered and assessed.

recommendation. Parties should respond within 5 working days and confine their comments to the factual accuracy; they should not normally repeat arguments already put to the Panel or to try to present new substantiation or lines of defence.

- 4.11. The Panel will then prepare a final recommendation within 10 working days and publish a copy on the Panel's website and also provide a copy to the parties to the dispute.

Appeals

- 4.12. The Panel will also consider disputes relating to advertising and misleading information on an appeals basis. The Panel will promote and maintain an appeals process that is independent, objective, fair, prompt and efficient.
- 4.13. A party must have already attempted resolution of the dispute directly with the PCT or through the dispute resolution process with the relevant SHA. Only once these avenues have been exhausted can a party appeal to the Panel. The Panel does not have the power to overturn PCT or SHA decisions; their remit is to advise on the application of the Principles and Rules and whether a breach has occurred.
- 4.14. The Panel will only consider appeals about the incorrect application of the requirement in the Principles and Rules to adhere to the Code. If a party has concerns about the process used to reach a decision at the local level, this unfortunately will not be sufficient grounds to appeal to the Panel. The process by which appeals will be considered is outlined below and also at Appendix 2.
- 4.15. A party should notify the Panel in writing of its request for an appeal within 25 days of the relevant decision being handed down. The Panel will confirm receipt of the request within 5 days.
- 4.16. The initial application requesting an appeal will form the basis of the appellant's case and parties will be expected to respond to this submission. Consequently, the applicant's submission must demonstrate it meets the acceptance criteria outlined above.
- 4.17. If the submission meets the acceptance criteria, the Panel will publish a Notice of Acceptance and non-confidential version of the appellant's submission on its website within 10 days of confirming receipt. If the appeal does not meet the acceptance criteria, the Panel will write to the party requesting the appeal and explain the reasons for refusal.
- 4.18. The Panel will, at the same time as it publishes the Notice of Acceptance, write to all parties involved notifying them of the appeal as well as the process and timetable that it intends to follow. The Panel will also invite submissions from the parties to the dispute in reply to the appellant's submission, as well as the relevant SHA in their role as system manager. The Panel will place non-confidential versions of party submissions on its website.
- 4.19. The Panel will accept submissions from third parties that have sufficient interest in the matter in response to the publication of the Notice of Acceptance. Although the Panel reserves the right to invite third party submissions in limited circumstances, the onus is on the parties to the appeal to provide all information that is necessary for the Panel to conduct a thorough review of the decision in question. Party and third party submissions must be received within 15 days of the publication of the Notice of Acceptance.
- 4.20. The Panel will then conduct hearings with the parties to the appeal. The purpose of such hearings is to provide participants an opportunity to set out

their arguments, including all relevant issues and material facts; and for the Panel to ask questions and seek certainty around the issues. Hearings will run for a maximum of 2 days and parties must be prepared to articulate their arguments and concerns clearly and succinctly.

- 4.21. Third parties that have a sufficient interest may be invited to present at hearings, however this remains at the Panel's discretion.
- 4.22. Once a hearing has concluded, parties will be given the opportunity to make further submissions on issues arising out of the hearing. Parties will have 10 days within which to make further submissions. The process is not intended for parties to present existing arguments or evidence and the Panel will only consider new material addressing issues arising out of the hearing (if any).
- 4.23. The Panel will then assess all information received during the course of the appeals process and prepare a decision outlining its findings. The decision will be published 10 days from the closing of further submissions. A non-confidential version of the decision will be published on the Panel's website.
- 4.24. The Panel expects to reach a decision and publish its recommendation within 40 days from the date of publishing the Notice of Acceptance.

5. Remedies

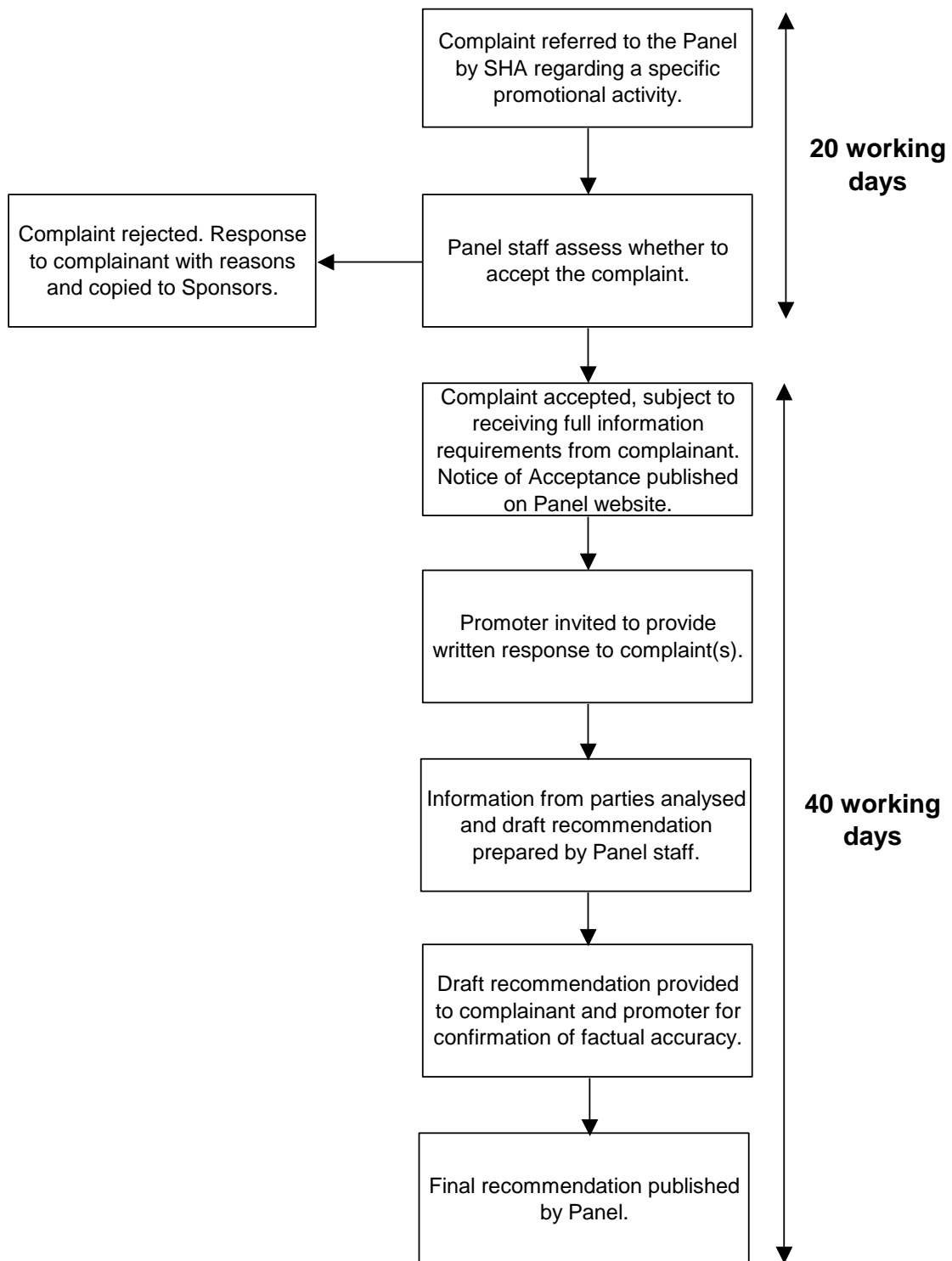
5.1. Upon completing a referral or appeals process, the Panel's recommendations may include one or more of the following:

- dismissing the complaint; or
- upholding the complaint and recommending to the responsible SHA appropriate enforcement action, including:
 - (i) Contractual remedies and/or sanctions;
 - (ii) Removal of the provider's details from the NHS Choices website (by agreement with DH);
 - (iii) Recommending a letter to be sent from the Secretary of State for Health to the provider or its professional body (by agreement with DH); or
 - (iv) Any other recommendation the Panel deems fit under the specific case circumstances.

6. Submission content

- 6.1. All submissions to the Panel should include the following information:
- Name, addresses, telephone number, fax number and email address of the applicant;
 - Name and title of the person(s) authorised to represent the applicant;
 - Evidence that each of the acceptance criteria has been met;
 - Details of the advertising or promotional activity that form the basis of the complaint (eg copy of the advertisement/s);
 - A detailed explanation of the infringing material and which sections of the Code of Conduct and Principles and Rules have been breached. And, in the case of an appeal, a detailed statement of reasons for appealing against the local decision;
 - Desired outcome or resolution; and
 - A non-confidential version of the above submission.
- 6.2. A party wishing to file a request for an appeal must include the following additional details in its submission
- A full copy version of the decision being challenged; and
 - Copies of all previous decisions relating to the matter (including those of the relevant PCT or SHA).

Appendix 1: Process for SHA referrals regarding promotional activity



Appendix 2: Process for appeals of decisions regarding promotional activity

