

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Regulation of Health and Adult Social Care Services

Chapter 1 – Monitor

639. Monitor is currently the Independent Regulator of NHS foundation trusts. It is responsible for determining whether NHS trusts are ready to become NHS foundation trusts, ensuring foundation trusts comply with the conditions of their authorisations, and supporting their development. Monitor would continue to exist under this Act but would become the regulator for all health care services. Monitor's overarching duty will be to protect and promote the interests of people who use those services, by promoting provision of health care services which is economic, efficient and effective and which maintains or improves the quality of services. Monitor will address anti-competitive or potentially anti-competitive behaviour in the provision of health care services, set or regulate prices and support commissioners in ensuring the continuity of services. To enable it to deliver these functions, Monitor will have the power to licence providers of NHS-funded care. Monitor will also have concurrent powers with the Office of Fair Trading, in relation to healthcare services.
640. The Act allows for Monitor's functions to be extended so that they are exercisable in relation to the provision of adult social care services in England.
641. [Schedule 8](#) provides for the structure and governance of Monitor, which will remain as a non-Departmental public body. The provisions are designed, as far as is practicable, to be consistent with the other non-Departmental public bodies in the health sector.

Section 61 - Monitor

642. Monitor's current title is the 'Independent Regulator of Foundation Trusts'. This section provides that Monitor continues to exist. The organisation's legal title will become 'Monitor' and it will carry out the duties and additional functions specified in later sections. This section also gives effect to the Schedule described below.

Schedule 8 - Monitor

643. This Schedule provides for Monitor's governance arrangements. It includes details of the membership of Monitor and the process for appointments, including the appointment of the chief executive.
644. [Paragraphs 1](#) and [2](#) detail the membership and appointment of the chair, chief executive and other members of Monitor. The chair and at least four other members must be appointed by the Secretary of State. The chief executive and other executive members are appointed by the non-executive members, with the consent of the Secretary of State. The number of non-executive members must be equal to or exceed the number of executive members and no more than five executive members could be appointed without the consent of the Secretary of State. This is intended to ensure that Monitor's

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(c.7) which received Royal Assent on 27 March 2012*

board remains at an appropriate size and to ensure that appointment of any additional members is justified.

645. Paragraphs 3 to 5 make provision for arrangements for the office of non-executive members. Under these paragraphs, tenure of office is in accordance with the terms and conditions of appointment but cannot be for more than four years. The Secretary of State may suspend or remove a non-executive member from office, on the grounds of incapacity, misbehaviour, or failure to carry out duties. Where a non-executive member is suspended from office, the Secretary of State must follow the procedures set out in paragraph 4. The Secretary of State must provide the individual with notice of the suspension, and there is a process for review of the suspension. There is also provision for the Secretary of State to appoint an interim chair when a chair is suspended (see paragraph 5).
646. The suspension must be for an initial period of not more than six months. It may be reviewed by the Secretary of State at any time and must be reviewed if the person suspended requests it.
647. Paragraph 6 requires that Monitor must pay to non-executive members such remuneration and allowances as the Secretary of State may determine. It also provides for Monitor to make arrangements for pensions, allowances and gratuities to be paid to non-executive members or former non-executive members. These arrangements would be for Monitor to determine with the approval of the Secretary of State.
648. Paragraph 7 provides Monitor with powers to employ staff on such pay, terms and conditions as it may determine, following Secretary of State approval of its policy on the remuneration, pensions etc of employees.
649. Paragraph 8 makes provision about pension arrangements for the person appointed as chair of Monitor. Where that person is a member of a public sector pension scheme under section 1 of the Superannuation Act 1972, the Minister for the Civil Service can decide whether time as chair of Monitor can count as years of service for that pension scheme. This paragraph also makes provision for employment with Monitor to be included among the kinds of employment to which such a pension schemes may apply.
650. Paragraph 9 gives Monitor the power to appoint committees and sub-committees, and to pay remuneration and allowances to committee members if they are not members or employees of Monitor.
651. Paragraph 10 allows Monitor to regulate its own procedure and states that any vacancy amongst the members does not affect the validity of its actions.
652. Paragraph 11 requires Monitor to act effectively, efficiently and economically in exercising its functions and provides power to arrange for any of its functions to be exercised on its behalf by certain persons.
653. Paragraph 12 enables Monitor to engage and pay individuals to contribute to particular cases or types of cases. This will enable Monitor to have access to people with specialist skills during its consideration of such cases.
654. Paragraph 13 gives Monitor the power to temporarily borrow money by overdraft with the consent of the Secretary of State. Other than this arrangement and powers to borrow money in relation to financial mechanisms to support continuity of services, Monitor is not allowed to borrow money.
655. Paragraph 14 allows Monitor to obtain and compile information in order to be able to take informed decisions in exercising its functions. This could include the commissioning or supporting of research.
656. Paragraph 15 gives Monitor the power to do anything it needs to in order to exercise its functions.

657. [Paragraph 16](#) allows the Secretary of State to fund Monitor's activities to the extent that he considers appropriate.
658. [Paragraph 17](#) makes provision about NHS foundation trust accounts. Monitor is required to prepare a set of accounts in each financial year which consolidates the annual accounts of all foundation trusts. The Secretary of State may, with HM Treasury approval, direct Monitor to prepare a set of interim accounts which consolidates any interim accounts prepared by NHS foundation trusts. The Secretary of State may, also with HM Treasury approval, give directions which specify the content and form of the accounts and methods and principles by which the accounts should be prepared. This ensures that the Secretary of State would receive whatever information in respect of foundation trusts he required to permit him to fulfil his statutory duties in respect of the Department's own consolidated Resource Accounts.
659. Any consolidated accounts (both annual and interim) prepared by Monitor under this paragraph must be audited by the Comptroller and Auditor General where the Secretary of State directs. Monitor is also required to act with a view to securing that NHS foundation trusts comply promptly with requests from it or from the Secretary of State relating to accounts, and to facilitate the preparation of accounts by the Secretary of State.
660. Once the responsibility for preparing consolidated accounts for foundation trusts transfers from Monitor to the Secretary of State, this paragraph will no longer apply.
661. [Paragraphs 18 to 20](#) make provision about Monitor's accounts. Monitor is required, as a non-Departmental public body, to prepare its own annual accounts in the form and with the content, and using methods and principles, determined by the Secretary of State with HM Treasury's approval. Monitor must prepare annual accounts which must be sent to the Comptroller and Auditor General who is responsible for laying copies of the audited accounts (and his report on them) before Parliament.
662. The Secretary of State may require Monitor to produce interim accounts in addition to its annual accounts. The Secretary of State may direct that these accounts are sent to the Auditor General and Comptroller for audit. If they are, copies must be laid before Parliament along with the report on the accounts.
663. [Paragraph 21](#) provides that Monitor must publish an annual report on how it has exercised its functions. In particular, the report must set out how Monitor has promoted economy, efficiency and effectiveness and include statements of what it did to comply with its duties in sections 63(2) and 64(1)(h) (duties to have regard to Secretary of State guidance). Monitor must lay a copy before Parliament and send a copy to the Secretary of State. Monitor is also required to provide further information about its own functions and any information that it holds about NHS foundation trusts to the Secretary of State as required.
664. [Paragraph 22](#) requires Monitor to respond to recommendations made by the Parliamentary Committees about the exercise of its functions.
665. [Paragraphs 23 and 24](#) concern the use of Monitor's seal and its non-Crown status. These provisions replicate those currently in the NHS Act.

Section 62 – General duties

666. This section provides for Monitor's principal overarching duty and certain other general duties. Monitor's main duty is to exercise its functions so as to protect and promote the interests of people who use health care services, by promoting the provision of health care services that are economic, efficient and effective and which maintain or improve the quality of services. It is intended that in 'protecting' interests Monitor will act to ensure that the interests of people who use health services are not diminished; whilst 'promote' is intended to mean furthering their interests. *Subsection (2)* provides that Monitor, in carrying out this duty, must consider the likely future demand for health

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services. These general duties will apply to the exercise of all of Monitor's functions, including those functions it will continue to exercise under the NHS Act.

667. *Subsection (3)* provides that Monitor must exercise its functions with a view to preventing anti-competitive behaviour in the provision of NHS health care services, where such behaviour is against the interests of NHS patients. For example, if providers colluded to fix prices or to restrict the range of services available to commissioners (eg. to restrict provision of care in patients' homes rather than in a clinic or hospital setting), against the interests of patients, then such behaviour may be anti-competitive.
668. *Subsections (4) to (6)* concern the integration of NHS healthcare services, and between health and social care services. Subsections (4) and (5) require Monitor to exercise its functions with a view to enabling the integration of health care services or the integration of health care services with other health-related services or social care services, provided it considers certain conditions are met. These are that the integration of services would:
- improve the outcomes from or other aspects of the quality of services,
 - improve the efficiency with which they are provided,
 - reduce inequalities in access to services,
 - reduce inequalities between patients in the outcomes services achieved.
669. An example of a health-related service in this context could be a pharmaceutical service.
670. *Subsection (6)* should ensure that, in enabling the integration of services, Monitor works effectively with, and where appropriate takes its lead from, commissioners. The subsection requires Monitor, when enabling the integration of services, to have regard to the duties on the NHS Commissioning Board and on commissioners to promote the integration of services.
671. *Subsection (7)* requires Monitor to make proper provision for the involvement of patients and the wider public in its work. It would be for Monitor to decide what arrangements for patient and public involvement would be appropriate to particular aspects of its work and how to secure that involvement. The subsection excludes decisions that Monitor makes in individual cases (such as whether or not to award a licence to a particular provider). There is specific provision elsewhere in the Act for Monitor to consult particular organisations and people when exercising certain functions, for example under section 118 (consultation on proposals for the national tariff).
672. *Subsection (8)* requires Monitor, as appropriate, to secure professional clinical and public health advice to help it to discharge its functions effectively. It would be for Monitor to decide what clinical and public health advice would be appropriate to particular aspects of its work and how to secure that advice.
673. The Secretary of State has a duty under section 1(1) of the NHS Act to promote a comprehensive health service, and *subsection (9)* requires Monitor to exercise its functions in a manner consistent with the Secretary of State's performance of that duty.
674. *Subsection (10)* is intended to ensure that Monitor does not, exercise its function for the purpose of causing any variation in the proportion of NHS health care services that are delivered by a particular description of provider, where that description is by reference to whether the provider is public or private sector or some other aspect of their status. The Act provides for similar duties on the Secretary of State and the NHS Commissioning Board.

Section 63 – Secretary of State’s guidance on duty under section 62(9)

675. This section provides the Secretary of State a power to publish guidance for the purposes of assisting Monitor to comply with its duty under section 62(9) to exercise its functions in a manner consistent with the Secretary of State’s duty to promote a comprehensive health service in England.
676. *Subsection (1)* provides that the guidance would address-
- a) the objectives specified in the mandate published under section 13A of the NHS Act which the Secretary of State considers to be relevant to Monitor’s exercise of its functions, and
 - b) the Secretary of State’s reasons for considering those objectives to be relevant to Monitor’s exercise of its functions.
677. *Subsection (2)* requires that in exercising its functions, Monitor must have regard to any such guidance.
678. *Subsection (3)* provides that where the Secretary of State publishes guidance under subsection (1), the Secretary of State must lay a copy of the published guidance before Parliament.

Section 64 - General duties: supplementary

679. This section makes provision that applies to Part 3 including several definitions. In particular, it provides in *subsection (6)* that Monitor’s duties relate only to the supply of services, not goods supplied to services providers. However, Monitor’s duties would apply where the goods supplied are an integral part of healthcare services provided. This means, for example, that Monitor’s duties extend to the supply to the NHS of the entirety of a hip replacement service, including the replacement joint and necessary drugs. However, the duties would not cover the supply of the joints and drugs from the manufacturers to the supplier of the hip replacement service, which would be commercial matters.

Section 65 - Power to give Monitor functions relating to adult social care services

680. This section allows the Secretary of State to make regulations enabling or requiring Monitor to exercise certain specified functions in relation to adult social care in England. .

Section 66 - Matters to have regard to in exercise of functions

681. This section provides a list of the considerations to which Monitor must have regard when carrying out its functions.
682. *Subsection (1)* provides that the need to maintain the safety of people who use health care services would be paramount amongst the matters that Monitor must have regard to in carrying out its functions.
683. *Subsection (2)(a)* concerns the need for continuous improvement in quality and efficiency in NHS services. The inclusion of continuous improvement in the quality of NHS healthcare services is to ensure that Monitor’s actions must not impede the Secretary of State, NHS Commissioning Board and CCGs in carrying out their duties with a view to improving quality.
684. *Subsection (2)(b) to (d)* concerns the need for commissioners to ensure fair access to services based on clinical need and make best use of resources in doing so. These provisions are intended to ensure that Monitor acts in concert with commissioners and does not impede them in the exercise of their duties.

685. *Subsection (2)(e)* concerns the desirability for providers of NHS health care services to cooperate with one another to improve the quality of such services. It complements the provision in subsections (4) to (6) of section 62 which place a duty on Monitor to act with a view to enabling integration. Subsection (2)(e) will be relevant in situations where services are integrated and, more generally, to ensure quality of care across organisational boundaries, for example, through appropriate sharing of information. For example, providers would need to cooperate to ensure that patients who are discharged from hospital to other care settings, including domiciliary care, experience a smooth transition and that appropriate information is shared across organisational boundaries to enable continuity and quality of care. Subsection (2)(e) is intended to ensure that in exercising its functions, Monitor has regard to the need for such cooperation.
686. *Subsections (2)(f) and (g)* require Monitor to have regard to the need to promote research into matters relevant to the NHS and to the need for high standards of education and training for healthcare professionals, in carrying out its functions.
687. *Subsection (2)(h)* provides that Monitor must have regard to any guidance the Secretary of State publishes on the parts of the document published for the purpose of section 13E of the NHS Act (improvement of quality of services) which the Secretary of State considers to be particularly relevant to the exercise of Monitor's functions. This may include, for example, guidance on national metrics for quality of care and health outcomes,

Section 67 - Conflicts between functions

688. This section places requirements on Monitor when it considers that conflicts arise between its general duties under sections 62 and 66. The requirements include resolving any such conflict in the manner Monitor considers best, and publishing statements of conflicts that have arisen that are of particular significance, how they have been resolved and the reasons for resolving them in the manner chosen. The guiding principle for Monitor in resolving any such conflicts would be its overarching duty to 'protect and promote patients' interests by promoting healthcare services which (a) is economic, efficient and effective, and (b) maintains or improves the quality of the services.
689. *Subsection (2)* requires that Monitor must carry out its functions so that there is not, and could not reasonably be regarded as being, any conflict between: (a) its exercise of the functions it has under the NHS Act and paragraph 17 of Schedule 8 to this Act, and its transitional functions under sections 111 and 113 of this Act, and (b) its exercise of any of its other functions.
690. *Subsection (3)* provides that Monitor must ignore any consideration of its transitional functions under sections 111 and 113 when exercising its competition functions, under Chapter 2, or its pricing functions under Chapter 4. For example, Monitor would need to establish "chinese walls" within its organisation so that any information relating to the exercise of its functions under sections 111 and 113 in individual cases could not influence the exercise of its competition and pricing functions .
691. *Subsections (4) and (5)* create additional requirements for Monitor to act transparently by publishing a statement on how it has resolved any conflict between its general duties that may arise in a particular case. Such a statement must set out: the nature of the conflict; the manner in which Monitor decided to resolve it; and, its reasons for deciding to resolve it in that manner. The cases to which these further requirements apply are ones, which either: involve a major change to Monitor's activities, including a major change to standard licence conditions under section 94; or are likely to have a significant impact upon persons who provide, or persons who use, NHS services, or the upon the general public in England (or a particular part of England); or, which, Monitor considers are otherwise of unusual importance.
692. Every year, Monitor must include in its annual report a statement setting out the arrangements it has made to avoid conflicts arising in the exercise of its functions, under

subsection (2), and a summary of how it has resolved any conflicts arising in particular cases under subsection (5).

Section 68 - Duty to review regulatory burdens

693. This section requires Monitor to keep its exercise of functions under review to ensure that it does not impose or maintain unnecessary burdens, having regard to best regulatory practice. It is based on section 72 of the Regulatory Enforcement and Sanctions Act 2008. The purpose of *subsection (1)* is to ensure that Monitor only imposes regulation that is necessary and proportionate, and that this is reviewed over time. This means that where developments over time render a particular regulatory burden no longer necessary then Monitor should remove that burden.
694. The remainder of this section stipulates that Monitor is required to publish a statement, reporting upon its duty to review regulatory burdens over the previous year and setting out its plans for the following year. Monitor is then required to have regard to its statement when carrying out its functions. Monitor would be able to revise the statement, but must publish revisions as soon as practicable.

Section 69 - Duty to carry out impact assessments

695. This section requires Monitor to carry out and publish an impact assessment, or publish reasons for not carrying out such an assessment, before taking certain actions. Where Monitor carries out an impact assessment, it must allow representations on the proposal. The requirements apply in relation to anything Monitor intends to do that is likely to have a significant impact on patients, providers or the public, or involve either a major change in the activities Monitor undertakes or a major changes in the standard conditions for holding a licence. The section does not apply to the exercise by Monitor of its functions under Chapter 2 (competition), including when carrying out individual investigations.
696. *Subsections (5) and (6)* provide for what the impact assessment must contain and the form it should take. An impact assessment must set out how a particular action was intended to fulfil Monitor's general duties, including what the particular action was intended to achieve and explain why. Where relevant an impact assessment would need to explain why Monitor could not secure the desired outcome by exercising its powers under the Competition Act 1998 or the Enterprise Act 2002. Monitor may decide what else the assessment should include, taking account of general guidance on impact assessments as appropriate.
697. *Subsections (7) and (8)* provide for consultation on impact assessments. The impact assessment must specify a consultation period of not less than 28 days. Monitor cannot implement the proposed action until the consultation period has ended. *Subsection (9)* also makes it clear that the duty to consult under this section is in addition to any other obligations Monitor has to consult about a particular issue although the consultations may take place at the same time.
698. *Subsection (10)* stipulates the way in which Monitor would be required to report upon the assessments it had carried out in each financial year.

Section 70 - Information

699. This section stipulates that Monitor may use any of the information it collects from providers to support any of its regulatory functions. It must supply any information to the Secretary of State as requested for the exercise by him of a function under this Part.

Section 71 – Failure to perform functions

700. This section gives power to the Secretary of State to direct Monitor as to the performance of its functions, when he considers that Monitor is failing, or has

failed, to perform its functions properly, or at all, and that the failure is significant. Failure to perform a function properly will include failure to perform that function consistently with what the Secretary of State considers to be in the interests of the health service (*subsection (6)(b)*). It is intended that this power would only be used in exceptional circumstances. Similar powers of intervention are included in the Act for other non-Departmental bodies including the Care Quality Commission and the NHS Commissioning Board. The Secretary of State can direct Monitor to perform those functions. When exercising that power, the Secretary of State must publish the reasons for doing so. However, the Secretary of State may not, under *subsection (2)*, intervene with regard to Monitor's performance of its functions in individual cases. Where Monitor fails to comply with such a direction, the Secretary of State may carry out the functions in question, or make arrangements for some other person to perform them on the Secretary of State's behalf.

701. This section does not apply to Monitor's functions under sections 72 and 73. This means that the Secretary of State cannot intervene to perform concurrent functions under the Competition Act 1998 or the Enterprise Act 2002, including undertaking investigations or enforcement action in individual cases.

Chapter 2 – Competition

702. This Chapter provides Monitor with powers to protect and promote patients' interests, by preventing anti-competitive behaviour, by providers, that would harm patients interests'; and by enforcing requirements imposed on commissioners of NHS health care services under regulations made under section 75. Nothing in this Chapter provides power for Monitor to promote competition as an end in itself.
703. To enable Monitor to tackle abuses and restrictions that act against patient interests, these sections give it concurrent powers with the Office of Fair Trading ('the OFT') under the Competition Act 1998 ('the 1998 Act'). This could be used, for example, to allow Monitor to investigate practices by undertakings that might restrict, distort or prevent competition, such as actions to exclude competitors from providing services or agreements to restrict patient choice. It also provides for Monitor to have concurrent functions with the OFT under Part 4 of the Enterprise Act 2002 to refer features of markets for further investigation by the Competition Commission.
704. This Chapter also makes provision about mergers involving NHS foundation trusts and co-operation between Monitor and the OFT.

Section 72 - Functions under the Competition Act 1998

705. This section provides Monitor with concurrent functions with the OFT under Part 1 of the 1998 Act in relation to the provision of health care services in England.
706. Chapter 1 of Part 1 of the 1998 Act prohibits undertakings from reaching certain agreements and decisions and carrying out concerted practices that prevent, restrict or distort competition. For example, it may prohibit organisations from reaching agreements to limit patient choice or apportioning healthcare markets, except where an exemption or exclusion applies. However, it permits beneficial co-operation, for example where the benefits to patients outweigh any disadvantages, in the form of agreements which contribute to improving the production or distribution of goods and services or promoting technical or economic progress, while allowing consumers (i.e. patients) a fair share of the resulting benefit, and which do not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
707. Chapter 2 of Part 1 of the 1998 Act prohibits undertakings from abusing a dominant position in a market. For example, it prohibits organisations with a dominant position from: imposing unfair trading conditions; limiting production, markets or

technical development to the prejudice of consumers (i.e. patients); applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or making the conclusion of contracts subject to supplementary obligations unrelated to the contract.

708. Since 2004 the UK has been required to apply EU competition law when applying national competition law. The prohibitions under Chapter 1 and Chapter 2 of the 1998 Act are modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union, which prohibit agreements that prevent, restrict or distort competition, and prohibit abuse of a dominant position.
709. The 1998 Act is generally applied and enforced by the OFT. The OFT is currently responsible for applying and enforcing the Act in relation to health care services.
710. Under the Act, Monitor has concurrent powers with the OFT to conduct investigations where it has reasonable grounds for suspecting that the prohibitions – under either UK or EU law – have been infringed in the provision of health care services in England.
711. Using the concurrent powers, Monitor can also provide remedies for breaches of the prohibitions. It can issue directions to undertakings to bring an infringement to an end and issue fines. For example, Monitor might direct an undertaking to change its conduct, such as ceasing an arrangement that restricted the ability of commissioners to redesign components of services and thereby restricted competition to the detriment of patients and taxpayers. Any revenue from fines would be paid into the consolidated fund.
712. There are some functions of the OFT under the 1998 Act which Monitor does not share. For example, the OFT is responsible for issuing guidance on appropriate levels of penalties for infringements of the prohibitions in the 1998 Act and for making procedural rules to be followed under that Act. Monitor cannot exercise these functions, because the OFT is responsible for issuing this type of guidance and making regulations on the application of the 1998 Act for the economy as a whole. This arrangement is designed to secure consistent application of that Act. However, Monitor is still required to issue advice and information about the application and enforcement of the 1998 Act in relation to health care services.

Section 73 - Functions under Part 4 of the Enterprise Act 2002

713. This section gives Monitor concurrent functions with the OFT under Part 4 of the Enterprise Act 2002 ('the 2002 Act'), in respect of the provision of health care services in England. These powers enable Monitor to make market investigation references (see below) to the Competition Commission.
714. Monitor can make a market investigation reference to the Competition Commission if it has reasonable grounds for suspecting that any features of a market prevent, restrict or distort competition. For example, Monitor might refer a market to the Competition Commission if there are barriers to entry which require more detailed investigation.
715. After receiving a market investigation reference the Competition Commission must investigate and publish a report within two years. If it decides that there is an adverse effect on competition and resulting detrimental effects on consumers (i.e. patients), it also decides whether any action should be taken to remedy this.
716. *Subsection (4)* contains provision requiring Monitor and the OFT to consult each other before exercising their concurrent functions under the 2002 Act for the first time. *Subsection (5)* is designed to avoid duplication by prohibiting both Monitor and the OFT from exercising these functions if the other has already done so in relation to a particular matter.
717. This section also applies section 117 of the 2002 Act so that Monitor is included (insofar as this is relevant to its functions under this section), in the list of persons and bodies to whom it is an offence to knowingly or recklessly supply false or misleading information.

Sanctions available to the courts in respect of this offence are set out in section 117 of that Act.

718. There are some functions under Part 4 of the 2002 Act which Monitor does not share. Specifically section 166, which requires the OFT to keep a register of undertakings, and section 171, which requires the OFT to publish guidance about market investigation references. This duty is to remain with the OFT so that guidance is consistent across different sectors.

Section 74 - Competition functions: supplementary

719. This section makes a number of supplementary provisions relating to Monitor's competition functions.
720. *Subsection (1)* states that the concurrent nature of Monitor's powers means that there can be no valid objection that its actions under these powers should have been carried out by the OFT.
721. *Subsections (2) and (3)* make provision about the relationship between Monitor's competition functions and its general duties. Chapter 1 of this Part makes provision about Monitor's general duties and matters to which Monitor must have regard in exercising its functions. Subsection (2) provides that those duties and matters do not apply where Monitor is carrying out its concurrent competition functions under Chapter 2, unless they are matters to which the OFT can also have regard. For example, whilst Monitor and the OFT may both have regard to patients' interests in relation to the provision of healthcare services for the purposes of the NHS, the OFT would not always have regard to considerations relating to promoting research into matters relevant to the NHS. This provision is to avoid inconsistency in the application of competition law, depending on which regulator is exercising the function in a particular instance.
722. *Subsection (4)* adds Monitor to the list of regulators in the Company Directors Disqualification Act 1986 with powers to apply to a court to make a company director disqualification order, where the director's organisation had committed a breach of competition law. The Company Directors Disqualification Act 1986 specifies the issues courts should consider when assessing whether to issue a disqualification order against a director following a breach of competition law.
723. The OFT already has the power to apply to a court to disqualify directors in the health care sector and other industries where there has been a breach of the 1998 Act.
724. *Subsections (5) to (7)* amend the 1998 Act and the 2002 Act to include Monitor in provisions of those Acts which are relevant to Monitor's concurrent powers.

Section 75 – Requirements as to procurement, patient choice and competition

725. This section enables the Secretary of State to make regulations imposing requirements on the NHS Commissioning Board and CCGs in order to ensure good practice in relation to procurement, to ensure the protection and promotion of patients' rights to make choices regarding their NHS treatment and to prevent anti-competitive behaviour by commissioners with regard to health care services. This may include requirements on the use of competitive tendering by commissioners and on securing services without competition (in which case the requirements which would apply would depend on the decision by the commissioner as to which approach would be in patients' best interests). The regulations could also include requirements to manage potential conflicts between the interests involved in commissioning services and the interests involved in providing them (*subsection (3)*). Where a contract is for goods and services, *subsection (2)* provides that the regulations will only apply where the value of the part of the contract for services is greater than the value of the goods. This is intended to ensure that the regulations only capture contracts that are primarily for services rather than goods.

726. *Subsection (4)* allows for regulations to provide for exemptions in relation to particular arrangements.

Section 76 – Requirements under section 75: investigations, declarations and directions

727. This section makes provision for what may be included in regulations made under the previous section about Monitor's powers to investigate and remedy breaches of the regulations. Monitor could be given the power to investigate a breach of any of the requirements in the regulations following a complaint by an interested party and to initiate an investigation where it has reasonable grounds to suspect that there has been a breach of the requirements in the regulations not to engage in anti-competitive behaviour. It could also be given powers to require commissioners to provide information and explanations of that information during an investigation.
728. *Subsections (3) to (5)* make provision for the regulations to confer on Monitor powers to declare, in specified circumstances, that an arrangement for the provision of services is ineffective (that is, to declare a contract void). *Subsection (4)* provides that those powers are only be exercisable in circumstances where there has been a sufficiently serious breach of the regulations. Where Monitor deems a particular arrangement for service provision to be ineffective, it would be void, but this would not affect any right acquired or liability incurred under the existing arrangements for service provision.
729. *Subsection (6)* provides that regulations may give Monitor a further power to direct the NHS Commissioning Board or a CCG to take action to address a breach of the regulations. This could include requiring the commissioner to take steps to prevent or mitigate failures, to comply with the regulations or to remedy any such breach, to modify a tendering process or vary an arrangement for the provision of services which was made as a result of a tendering process, or not to exercise such functions in such a manner as may be prescribed in the regulations.
730. *Subsections (7) and (8)* make provision about actions brought for a failure to comply with the regulations. In the event of loss or damage caused by a failure to comply with a requirement imposed by the regulations, a person affected would be able to bring an action, unless the regulations restricted this. Regulations may also provide for a specified defence to such an action.
731. There may be circumstances in which it is possible for a person to bring an action under both the regulations made under the previous section and the Public Contracts Regulations 2006 (S.I. 2006/5). In those circumstances, any person bringing an action under the Public Contracts Regulations 2006 is precluded from bringing an action under regulations made under the previous section in relation to the same matter.

Section 77 – Requirements under section 75: undertakings

732. This section allows regulations under section 75 to confer on Monitor a power to accept undertakings ('section 77 undertakings') in lieu of issuing a direction or declaring an arrangement ineffective under section 76. This enables commissioners who are in breach of the regulations to offer undertakings that would address the breach. The undertakings could be to take any of the actions described in paragraphs (a) to (e) of subsection (6) of section 76 or any other actions specified in the regulations.
733. Where Monitor accepts an undertaking, *subsection (3)* requires it to cease any investigation and any actions it was taking to bring about an end to the breach, unless the commissioner in question failed to comply with the undertaking. Where a commissioner has partly complied with an undertaking Monitor is required to take this into account when determining further action.
734. This section also gives effect to Schedule 9.

Schedule 9 – Requirements under section 75: undertakings

735. This Schedule provides further detail about the process for entering into section 77 undertakings. Monitor must consult people it considers appropriate on its procedure for entering into section 77 undertakings and must publish this. Monitor must also publish any section 77 undertakings that it accepts, removing any commercial information that would harm business interests and information relating to a person's private affairs which might affect that person's personal interests. An undertaking can be varied by mutual agreement.
736. Monitor may determine that an undertaking has been complied with and issue a certificate of compliance accordingly. The person that has given the undertaking can also apply for a certificate of compliance, in such a form and manner as prescribed by Monitor, at any time, and Monitor must respond to such an application within 14 days.
737. Monitor may refuse to issue a certificate of compliance. A person whose application has been refused can complain to the First-tier Tribunal on the grounds that the decision is based on an error of fact, that it is wrong in law or that it is unfair or unreasonable. The First-tier Tribunal can confirm Monitor's decision or can direct that it does not have effect.
738. Where Monitor thinks that false or misleading information has been supplied, it can treat that as a failure to comply with the undertaking. If it treats it as a failure to comply, it must revoke any compliance certificate given to the person in question.

Section 78 - Guidance

739. This section requires Monitor to issue guidance on compliance with the regulations made under section 75 and on how Monitor intends to enforce those regulations. Monitor must consult the NHS Commissioning Board and others that it deems appropriate before publishing the guidance. It must also obtain the approval of the Secretary of State before publishing the first version of the guidance. When making subsequent revisions of its guidance it must consult with the NHS Commissioning Board and others that Monitor deems appropriate before publication. This and other requirements in the Act to publish guidance do not affect Monitor's ability to publish guidance on any other matter relating to any of its duties or functions.

Section 79 - Mergers involving NHS foundation trusts

740. This section applies Part 3 of the 2002 Act, which sets out the general merger control regime for enterprises in the UK, to NHS foundation trusts where it would otherwise be uncertain as to whether those provisions would apply to them. This section is intended to avoid legal uncertainty as to when the merger control regime in Part 3 of the 2002 Act would apply to mergers involving NHS foundation trusts. This provision allows for a single regime for merger control, which avoids duplication of the roles of Monitor and the OFT and eliminates risk of double-jeopardy. The OFT must notify Monitor of a merger situation involving one or more Foundation Trusts Monitor in turn must advise the OFT on the likely costs and benefits to patients which would arise. The OFT is obliged to consider the advice from Monitor as part of their general public law duties.

Section 80 - Co-operation with the Office of Fair Trading

741. This section requires Monitor and the OFT to co-operate in exercising their concurrent functions under the 1998 Act and the 2002 Act. In particular, they must share relevant information that would enable and assist the other to exercise its functions and provide such other assistance as the other may require.

Chapter 3 – Licensing

742. This Chapter establishes a licensing regime for providers of health care services for the purposes of the NHS and provide Monitor with the necessary powers to run the regime. The regime gives Monitor the means to perform its main duty and carry out its functions; for example, it will provide a means for Monitor to collect information needed to set prices.
743. The Act gives Monitor powers to determine the licence criteria and conditions and gives it enforcement powers that enable it to ensure that providers comply with the requirements of their licences.
744. The Care Quality Commission currently registers providers of health and adult social care services to provide assurance that they meet essential levels of quality and safety. It will continue to exercise this role.
745. Monitor and the Care Quality Commission are required to co-operate and share information and they are required to establish a joint licensing/registration process.

Licensing requirement

Section 81 - Requirement for health service providers to be licensed

746. *Subsection (1)* stipulates that providers of health care services for the purposes of the NHS must hold a licence issued by Monitor. This does not include services provided for the purposes of the public health service.
747. *Subsection (2)* covers situations in which two or more legal persons are involved, in different capacities, in providing a service (eg. a prime contractor and subcontractor). It provides that, in this situation, regulations may set out who will be treated as the service provider for the purposes of the licensing regime. It is intended that this will be the person responsible for ensuring the service complies with the licensing requirements laid out in this (and any other relevant) legislation (eg. the prime contractor). This provision is based on section 10(2) of the Health and Social Care Act 2008, where the same provision is made for the purposes of registration with the Care Quality Commission.

Section 82 - Deemed breach of requirement to be licensed

748. This section provides that a licence holder is deemed to be in breach of the requirement to hold a licence if the organisation is required to register with the Care Quality Commission, but has not done so. The intention is that only providers who have complied with a requirement to register with the Care Quality Commission should be able to hold a licence.

Section 83 - Exemption regulations

749. This section provides the power for the Secretary of State to make regulations exempting providers of NHS services from the requirement to hold a licence. The regulations would be subject to the negative resolution procedure in both Houses of Parliament.
750. Individuals, groups of providers, or providers of certain types of health care services could be exempted. Exemptions could be time-limited, and/or conditional. *Subsection (3)* gives examples of the sorts of conditions that could attach to an exemption. For example, a person granted an exemption may be required to comply with any direction given by Monitor about a matter specified in the exemption.
751. The intention is that exemptions will be used to focus licensing on appropriate parts of the health care sector - those where regulation of competition and pricing, or action to support continuity of services is most likely to have a strong positive impact. It is,

for example, likely that the licensing regime would cover providers of accident and emergency services and secure mental health services. Exemptions might apply to, for example, smaller providers of family health services such as dentists, optometrists or primary medical care practices.

752. *Subsections (4) to (7)* provide for publication of the Secretary of State's intention to make exemption regulations and for representations to be made. The Secretary of State would have to give specific notice to Monitor, the NHS Commissioning Board, the Care Quality Commission and Healthwatch England (provided for in Chapter 1 of Part 5), as well as publishing more widely the proposal to make regulations, the effect of the regulations and the reasons for them. There must be a minimum period of 28 days, during which representations could be made, before the Secretary of State can make the regulations.
753. *Subsection (8)* provides that persons granted an exemption must be given notice of it. The Secretary of State must also publish exemptions granted.

Section 84 - Exemption regulations: supplementary

754. This section provides a mechanism for the Secretary of State to revoke or withdraw licensing exemptions. *Subsection (1)* provides that the exemption regulations themselves could be revoked in relation to an exemption granted to an individual provider, or amended in relation to regulations granting individual exemptions to more than one provider to enable any of the exemptions to be withdrawn. The Secretary of State can revoke or withdraw an exemption at the request of the provider, in accordance with the relevant exemption regulations themselves (for example if they provided for a conditional exemption), or if the Secretary of State considers it inappropriate for the exemption to continue.
755. *Subsection (2)* provides that exemption regulations granting an exemption to a group of providers could be revoked. Exemption regulations granting exemptions to more than one group of providers could also be amended to withdraw any of the exemptions. An exemption could be revoked or withdrawn either in accordance with the relevant exemption regulations themselves, or if the Secretary of State considers it inappropriate for the exemption to continue.
756. Under *subsection (3)*, the Secretary of State may by direction, withdraw an exemption for a particular provider within a group, whilst the exemption remained in place for the rest of that group. This may be done in accordance with the relevant exemption regulations, if the Secretary of State considered it inappropriate for the exemption to continue, or at the request of an individual provider.
757. When the exemption revocation or withdrawal is not at an individual provider's request, the Secretary of State must consult Monitor, the NHS Commissioning Board, the Care Quality Commission and Healthwatch England about the proposed withdrawal. If the exemption applies to an individual provider or providers within a group or type of providers that would remain exempt, the Secretary of State must also give notice to the provider(s) from whom he proposes to remove the exemption. If the exemption applied to a group or type of provider the notice of the proposal to remove the exemption must be published. The notice must state the Secretary of State's proposal and reasons for it, and specify a minimum 28-day period during which representations can be made.

Licensing procedure

758. These sections provide for the procedure for applying for a licence, and for Monitor granting, refusing or revoking a licence.

Section 85 - Application for licence

759. This section states that providers seeking a licence must apply to Monitor, who may require supporting information from them and specify the form in which applications may be made.

Section 86 - Licensing criteria

760. This section requires Monitor to set and publish the criteria that a provider must meet in order to be granted a licence. *Subsection (2)* provides that Monitor may revise the criteria and must publish any revised version. This is intended to enable Monitor to adapt the licence criteria as the health care market develops. *Subsection (3)* requires that these criteria, and any subsequent revisions, be approved by the Secretary of State by order. Later provisions require that the first such order must be subject to the affirmative procedure. The additional requirement for the Secretary of State's approval of the criteria for granting licences is to provide a check on their appropriateness.

761. Section 87 - Grant or refusal of licence

762. This section stipulates the process once an application for a licence has been made to Monitor. Where Monitor is satisfied that the provider has met the published criteria, it must approve the provider's application and, in accordance with *subsection (3)*, issue the licence to the applicant. If Monitor is not satisfied that the applicant meets the criteria, it must refuse the application.
763. *Subsection (4)* provides that licences are subject to both standard licence conditions and any special licence conditions. Further details about these types of conditions are in later sections. *Subsection (4)* also provides that licences granted to foundation trusts are subject to any licence conditions imposed under section 111 (imposition of licence conditions on NHS foundation trusts during the transitional period).

Section 88 - Application and grant: NHS foundation trusts

764. This section provides that Monitor must treat an NHS foundation trust in existence at commencement of this section, or an NHS trust which becomes a foundation trust at a later date, as having made an application and met the criteria for a licence. As a result of this, the foundation trusts will not have to make a licence application. Foundation trusts will however still be regarded as applicants for the purpose of the power to include special conditions in an applicant's licence under section 95. Organisations have to go through a robust authorisation process in order to gain foundation trust status under Chapter 5 of Part 2 of the NHS Act. The automatic granting of licences to foundation trusts will limit the regulatory burden on them.

Section 89 - Revocation of licence

765. This section provides Monitor with the powers to revoke a licence, either because the licence holder has requested this, or because the provider has failed to comply with a licence condition. A revocation provision is common to regulatory regimes that rely on a licence to deliver regulatory functions.
766. It is intended that Monitor will not automatically revoke the licence of a provider at their request where the continuity of services they are providing is required. In this way, providers of such services will not be able to avoid their obligations to provide such services simply by requesting revocation of their licence.
767. It is also intended that before revoking a licence for failure to comply with a condition of it, Monitor will first consider whether it could address the situation using its licence enforcement powers.

Sections 90, 91, 92 - Representations, notice and appeals

768. The first of these sections requires Monitor to give the relevant provider advance notice when it proposes to either refuse or revoke a licence; and to state the reasons for its intended course of action. This notice must also specify the period within which the provider may make written representations to Monitor, allowing them the opportunity to make a case against Monitor's proposal if they wish to. This period must be at least 28 days.
769. The next section specifies that once Monitor reaches a decision to either refuse or revoke a licence, it must notify the relevant provider of its decision and explain the right of appeal. The section also stipulates when Monitor's decision to revoke a licence becomes final. This is (a) if an appeal is brought, when the appeal is concluded or abandoned; (b) when the provider declares its intention not to appeal; or (c) the day after the day that the period for bringing an appeal ended.
770. The last of these sections provides for the process for appeals to the First-tier Tribunal against a decision of Monitor to refuse a licence application or revoke a licence. The Tribunal is the main appeals Tribunal in the UK, run by the Tribunals Service and established by Parliament under the Tribunals, Courts and Enforcement Act 2007. It is also used for Care Quality Commission registration appeals and for other appeals relating to care standards and mental health issues. It is also used for appeals against decisions by other regulators, including the Office of Fair Trading and the Environment Agency.
771. *Subsection (2)* specifies the possible grounds for appeal as an error of fact a mistake in law or unreasonableness. The Tribunal may either confirm Monitor's decision, direct that Monitor's decision is not to have effect, or send the case back to Monitor for reconsideration.

Section 93 - Register of licence holders

772. This section requires Monitor to keep and publish a register of licence holders. The register must contain such information as Monitor thinks necessary to keep the public informed about licence holders, including details of every licence granted or revoked. The information must be available to the public for inspection at Monitor's offices or available on request. However, there might be occasions on which it was not appropriate to release certain information to the public. *Subsection (5)* therefore provides for regulations setting out what information should not be accessible. *Subsection (6)* provides Monitor with power to charge a fee for providing a copy or extract of the register.
773. This section makes very similar provision to that for the register kept by the Care Quality Commission (see section 38 of the Health and Social Care Act 2008).

Licence conditions

774. These sections make provision in relation to the two types of licence conditions that Monitor may set. Standard conditions will apply to all providers, or to all providers of a certain type (based on their nature, the services they provide, or the areas where they provide the services). Special conditions set individual requirements for individual providers. Creating different types of conditions gives potential providers some certainty over what a licence will entail (standard conditions), whilst enabling Monitor to tailor licences as appropriate (special conditions).

Section 94 - Standard conditions

775. This section requires Monitor to set and publish the standard licence conditions. Standard conditions might include basic requirements necessary to support the regulator

in exercising its functions, such as submitting the information about service provision that Monitor needs to set prices effectively.

776. Before determining the first set of standard conditions, Monitor must publish its draft standard conditions and consult the persons listed in *subsection (8)*.
777. *Subsections (2) to (6)* allow Monitor to set different standard conditions for different types of licences by reference to the nature of the provider, the services provided or the geographical area in which services are provided. Monitor could use this power to set additional licence conditions to apply to certain providers to ensure the continuity of certain services provided by them. For example, Monitor may set particular requirements on foundation trusts to ensure they are well governed, consistent with foundation trusts' duty to exercise their functions effectively, efficiently and economically, as necessary conditions of their continued ability to provide NHS services (see section 164). The intention is to enable Monitor to differentiate standard licence conditions, where necessary, to protect and promote patients' interests and to reflect particular statutory requirements as they may apply to foundation trusts and other types of healthcare provider. In addition, by differentiating standard licence conditions appropriately, Monitor may seek to achieve a fair playing field for providers.
778. *Subsections (4) to (6)* impose constraints on Monitor's ability to set different licence conditions relating to the nature of the provider. Subsection (5) allows for different standard licence conditions to be imposed in relation to governance to take account of differences in the status of different licence holders. Subsection (6) allows for different standard licence conditions to be imposed so as to achieve an equivalent regulatory burden on providers as a result of the licence, for example, where different standard licence conditions are appropriate to take account of differences in the burdens to which different types of provider are subject.
779. The Secretary of State is given the power in *subsection (10)* to reject Monitor's proposed first set of standard conditions, as a whole rather than as individual conditions.

Section 95 - Special conditions

780. The power to include special licence conditions under *subsection (1)* is designed to address issues specific to particular licence holders, in situations where it would be problematic to define a description of relevant licences and applicable conditions, and hence to use standard licence conditions alone. For example, Monitor could use this provision to set licence conditions for a provider to secure continuity of NHS services in particular circumstances that Monitor considered were not captured within the standard licence conditions. Also by way of example, Monitor may set special licence conditions for a foundation trust (or other provider) which it considered were necessary in response to risks it identified; or to set special conditions prospectively so that those conditions would come into effect when interventions to secure the continuity of those services were required.
781. Monitor is able to include a special condition (or modify an existing one) if the applicant or licence holder consents. If that party does not agree and Monitor still wants the special condition or modification to be included in the licence, it may under section 101, make a reference to the Competition Commission, which will then investigate the appropriateness of including the special condition or making the modification.
782. Before including a special condition, or modifying one, Monitor must to comply with the notice requirements in *subsections (2) to (5)*.

Section 96 - Limits on Monitor's functions to set or modify licence conditions

783. This section specifies the purposes for which Monitor can set or modify licence conditions. Monitor would only be able to set licence conditions for the purposes specified in *subsection (2)*. For example, Monitor may use its licensing powers to

support commissioners in securing continuity of services or to enable integration of services and co-operation between providers.

784. *Subsection (4)* provides that Monitor must not exercise its powers to set or modify conditions so as to unfairly advantage or disadvantage providers as a result of their having a particular status, including whether they are in the public or private sector.

Section 97 - Conditions: supplementary

785. *Subsection (1)* provides, by way of example, a non-exhaustive list of conditions that Monitor might include in licences. These include a requirement for licence holders to pay Monitor such fees as Monitor may determine in respect of the exercise of its licensing functions; a requirement that providers charge for services in accordance with the national tariff (see Chapter 4); and the conditions for securing the continued provision of NHS services. *Subsection (7)* gives Monitor the power to apply time restrictions to conditions, either by indicating when a condition should take effect or when it should end.
786. *Subsection (3)* specifies that Monitor must not use the powers it has under subsection (1) (c) to direct a licence holder to give access to its facilities to another provider.
787. *Subsection (4)(a)* provides that Monitor can require NHS foundation trusts and bodies which were former NHS trusts to notify the Office of Fair Trading if they intend to enter into a merger situation, being arrangements or transactions which would result in the trust's, or another business's, activities ceasing to be distinct. This provision is to ensure that the Office of Fair Trading has notice of mergers involving NHS foundation trusts, or former NHS trusts. *Subsection (4)(b)* specifies that this requirement no longer applies after five years from the date on which the condition was included in the licence.

Section 98 – Conditions relating to the continuation of the provision of services etc.

788. This section makes further provision about Monitor's licensing powers to support commissioners in securing continuity of health care services for the purposes of the NHS. *Subsection (1)* provides that Monitor may, in particular (but not by way of limitation), set conditions under section 97(1)(i)(i) requiring a licence holder: to provide information to commissioners and other persons as directed by Monitor; to allow Monitor to enter and inspect its premises; and to co-operate with persons appointed by Monitor to assist in the management of the licence holder's affairs, business and property. *Subsection (2)* requires commissioners to also co-operate with any such persons appointed by Monitor. Monitor may set such other licence conditions for the purposes of ensuring a provider continues to be able to provide NHS services under the terms of its licence as Monitor considers appropriate, subject to sections 94-96. This may include, for example, requirements relating to liquidity and, where appropriate, actions to ensure the provision of services is effective, efficient and economic in the long term.
789. Monitor could take a number of measures under licence conditions set under section 97(1)(i)(i) to protect the continuity of NHS services in the case of a provider in financial difficulties (in "distress"). For example, Monitor could direct a provider in distress to appoint a "turnaround team", or require a provider to provide information and access to their records and premises to a continuity of service planning team appointed by Monitor. The aim of such measures would be, wherever possible, to return the provider to normal operation as soon as possible and ensure the continuity of services which required protection.
790. *Subsection (3)* requires Monitor to carry out an on-going assessment of the risks to the continued provision of services to which a licence condition under section 97(1)(i), (j) or (k) applies. This enables Monitor to intervene early to assist providers to reduce any unacceptable risk.

791. *Subsection (4)* requires Monitor to publish guidance for licence holders on the requirements placed on them via licence conditions under section 97(1)(i), (j) or (k) for ensuring the continuity of services. Monitor must also publish guidance for commissioners of services subject to such conditions on the exercise of their functions in connection with the licence holders who provide those services. This could include guidance on their role in the turnaround of licence holders in distress, or in taking steps to plan for possible unsustainability of a licence holder. Before publishing such guidance (whether initially or as revised), Monitor must obtain the approval of the NHS Commissioning Board and the Secretary of State. *Subsection (5)* requires commissioners of services which are subject to continuity of service conditions to have regard to such guidance.

Section 99 – Notification of commissioners where continuity of services is at risk

792. This section provides for action to be taken by Monitor as part of its ongoing assessment of risk to the continuity of NHS health care services. It obliges Monitor to notify the NHS Commissioning Board and CCGs where it identifies significant risks to the provision of services and is satisfied that this is attributable to the way in which services are configured. *Subsection (5)* requires the Board and CCGs to have regard to such notifications when arranging for the continued provision of NHS health care services. It would be for commissioners to decide how best to respond to notifications under this section and section 126.

Section 100 - Modification of standard conditions

793. This section makes provision for modification of standard licence conditions in all providers' licences or in licences of a particular description. Before making such a modification, Monitor must comply with the notice requirements set out in *subsections (2) to (5)*. These require Monitor to notify its intention to modify standard licence conditions and create the opportunity for those notified about the proposed modification to make representations.
794. Under *subsection (6)(a)* Monitor may make the modification if it received no objections from licence holders who would be affected by the change (relevant licence holders).
795. Where Monitor does receive representations from relevant licence holders, it may nonetheless make the modification if the proportion of licence holders objecting were below proportions specified by the Secretary of State in regulations made under *subsection (7)*. These regulations are subject to the affirmative Parliamentary procedure. Regulations must specify two proportions for these purposes. The first is the proportion of relevant licence holders who objected, expressed as a percentage of all relevant licence holders affected (the "objection percentage"). The second proportion is the number of relevant licence holders who objected, weighted according to their share of the supply of such services as may be prescribed (the "share of supply percentage"). This process is designed to enable Monitor to change standard licence conditions, but only where providers collectively do not have substantial objections to the proposed change. Where the objection percentage and/or the share of supply percentage exceed those specified in the regulations, Monitor may only make the proposed change in accordance with section 101.
796. Other provisions of section 100 deal with situations where Monitor modifies the standard licence conditions. *Subsection (10)* provides that Monitor must publish the modifications. It also gives Monitor the power to make modifications to other conditions in a licence that might be required as a consequence. Thirdly, Monitor is also required to make the same modifications to future licences, where that is appropriate. The latter two requirements are to ensure consistency across licences.

Section 101 – Modification references to the Competition Commission

797. Under *subsection (2)* Monitor may make a reference to the Competition Commission when the applicant or licence holder refused to accept a proposal to include, modify or omit a special licence condition. Under *subsection (4)* a reference may also be made where Monitor is unable to modify the standard licence conditions because the number of licence holders objecting to the change exceeded one or both of the proportions set out in regulations made under section 100(7).
798. The Competition Commission is required to investigate and report on the matters contained in the reference from Monitor. Subsections (2) and (4) set the parameters for the Commission's investigations and reports under this section. In all cases, the Commission must consider whether any of the matters specified in the reference and which relate to the provision (or potential provision in the case of special licence conditions) of healthcare services are operating, or could be expected to operate, against the public interest. The Commission could not, therefore, consider references in terms of the impact on competition as an end in itself. Where a reference is made under subsection (2) and hence follows the refusal by an applicant or licence holder to include, modify or omit a special licence condition, the Commission must also investigate and report on whether the inclusion, modification or omission of a special condition in a licence would remedy or prevent the detriment to the public interest. Where a reference is made under subsection (4) and hence following objections from licence holders to proposals for standard licence conditions, the Commission must also investigate and report on whether the inclusion, modification or omission of standard licence conditions (applicable to all or a group of providers) would remedy or prevent the detriment to the public interest. Hence, in considering references from Monitor under this section, the Competition Commission's prime concern is whether the proposed licence condition or modifications would be in the public interest.
799. *Subsection (5)* gives effect to Schedule 10, which makes provision about investigations by the Competition Commission. Paragraph 7(2) of Schedule 10 requires Monitor to make changes to licence conditions in line with reports by the Commission following these investigations.
800. *Subsection (7)* enables Monitor to make incidental or consequential changes to the other conditions in a licence, where one or more conditions in the licence is changed following a reference to the Competition Commission under this section. Monitor must also modify the conditions in licences it issued in future, so that these conditions, as they would apply to all providers or all providers of a particular description, are the same. This provision avoids the need for Monitor to give notice and consult where it modifies standard licence conditions following a report by the Competition Commission under this section.

Schedule 10 - References by Monitor to the Competition Commission

801. Under paragraph 1, where Monitor makes a reference to the Competition Commission Monitor is able to change what is included in that reference by giving notice to the Commission. The Commission is obliged to accept the variation.
802. The intention of paragraph 2 is to enable Monitor to assist the Competition Commission by identifying in a reference or variation of a reference, any aspects of the referred matter that might have an adverse effect on the public interest, and by suggesting any alterations to licence conditions to avoid or remedy these effects. Paragraph 3 requires Monitor to publish any reference, or variation to a reference, and to send notice of a reference or variation to relevant applicants, licence holders and CCGs and to the NHS Commissioning Board (section 101(5)(a) refers).
803. [Paragraph 4](#) requires Monitor to provide relevant information and assistance to the Competition Commission and the Commission to take information supplied into account.

804. Under paragraph 5, a reference to the Competition Commission must specify a period – not longer than six months from the date of the reference – within which the Commission must report. The Commission’s report only has effect if it is made before the expiry of the period stated in the reference or at the end of an extended period. An extended period applies where the Commission sought this from Monitor and where Monitor is content that special reasons for extending the period existed. An extension may be for no more than six months and Monitor may grant only one extension. Monitor must send notice of the extension to the relevant persons, and publish the notice.
805. [Paragraph 6](#) requires the Commission, when reporting on a reference, to present definite conclusions, including details of any aspects it concludes might have negative impacts on the public interest. There must also be explanations as to how the inclusion, modification or omission of licence conditions could remedy or prevent those impacts.
806. This paragraph also requires that a conclusion in a report must have the agreement of at least two thirds of the group assigned to the investigation by the Competition Commission. If a member of the group disagreed with a conclusion, they may require the inclusion in the report of a statement of their disagreement and the reasons for it.
807. The Commission must ensure a copy of its report on a reference is sent to Monitor, who is then required to send a copy to the Secretary of State. Not less than 14 days after the Secretary of State received the copy under paragraph 6(6), Monitor is required to send a copy to applicants or licence holders affected by the conclusions in the report, the NHS Commissioning Board and CCGs likely to be affected by the matters to which the report relates. Monitor is required to publish the report within 24 hours of complying with this requirement.

Changes following report

808. [Paragraph 7](#) requires Monitor to act on relevant recommendations made by the Competition Commission. Before doing so, Monitor must send a notice of the proposed changes to licence conditions to the relevant persons, explaining why it is taking such action, and publish the notice. The notice must specify a period – of at least 28 days from the date of publication - within which comments on the changes may be made. Once Monitor had considered the responses, it must notify the Commission, specifying the changes it proposes to make in response to the Commission’s report.
809. There would then be a four-week period, during which the Commission may direct Monitor (under paragraph 8) not to make the changes set out in the notice, or not to make some of the changes. Insofar as the Commission does not issue such directions, Monitor is required (under paragraph 7(11)) to make the changes it has proposed in response to the Commission’s report.

Competition Commission’s power to veto changes

810. Under paragraph 8, the Competition Commission may apply to the Secretary of State asking him to direct that the four-week period for it to veto Monitor’s proposed changes to licence conditions be extended by 14 days.
811. Where the Commission vetoes changes proposed by Monitor, it must give notice of the changes Monitor proposed and its reasons for directing Monitor not to make them. The Commission is required to make any changes to licence conditions that it considers necessary to address any adverse effects to the public interest identified in its report that it considers would not be remedied or prevented by the changes proposed by Monitor. The Commission must give Monitor and other relevant persons (section 101(5)(a) refers) 28 days’ notice of the changes it proposes to make, during which representations could be made. It must also publish the notice.
812. Once the changes had been made, the Commission must publish details of them and state why it had made them.

Disclosure

813. [Paragraph 9](#) requires the Commission, before making a report or giving notice in relation to its power to veto Monitor's proposed changes, to ensure that no information harmful to the public interest, no sensitive commercial information and no information which might significantly harm an individual's interests is included.

Powers of investigation

814. [Paragraph 10](#) provides that a number of investigative and enforcement powers under specified sections of Part 3 of the Enterprise Act 2002 apply, with specified modifications, for the purposes of references by Monitor to the Competition Commission.

Section 102 - Modification of conditions by order under other enactments

815. This section provides that the Office of Fair Trading, the Competition Commission and the Secretary of State, as relevant authorities, can modify standard conditions or conditions of a particular licence, by an order made under various specified provisions of the Enterprise Act 2002. This provision is to ensure that the licensing regime is consistent with measures taken under that Act, or can be modified as part of remedies imposed under that Act. The inclusion of a provision of this type is consistent with other regulatory regimes.

Section 103 – Standard condition as to transparency of certain criteria

816. The effect of this section is to require that Monitor must include a standard condition in all licences, which requires licence holders to act transparently in the setting and application of criteria for determining patient eligibility for particular services, for accepting or rejecting referrals, or determining the manner in which services are provided to that person. This is intended to ensure that providers act transparently in determining clinically appropriate care for patients and do not discriminate on non-clinical grounds. Nothing in this section will affect a person's entitlement to a particular treatment under the NHS. This transparency requirement will only operate wherever those services are subject to patient choice of provider. This will enable Monitor to minimise the scope for providers to make extra profits by 'cherry picking' - i.e. delivering a service only in less complex cases – by requiring them to be transparent about these matters. *Subsection (3)* specifies that certain powers conferred on Monitor, the Secretary of State, the Office of Fair Trading, and the Competition Commission by sections 100, 101 and 102 and Schedule 10 to modify licence conditions may not be used to omit such a condition from licences.

Enforcement

817. [Sections 104 to 110](#) provide Monitor with the necessary powers to enforce the licensing regime. Whilst the Monitor and the Care Quality Commission will work jointly in relation to the licensing procedure, the two organisations have separate enforcement responsibilities. However, they are obliged to share information about relevant enforcement actions taken. Monitor's enforcement powers are modelled on the set of civil sanctions for regulatory regimes laid down in Part 3 of the Regulatory Enforcement and Sanctions Act 2008.

Section 104 - Power to require documents and information

818. *Subsection (1)* provides Monitor with a power to require persons listed in *subsection (2)* to provide to Monitor any information that it needs to carry out its regulatory functions (as specified in *subsection (4)*). This power would apply to commissioners, applicants for licences, licensees, providers of NHS services exempted from holding a licence, or providers operating without a licence when they should have one. Its purpose is to allow Monitor to obtain the information it would need to operate effectively and fulfil its

functions. For example, Monitor could require a provider to submit information about its financial situation to support regulatory work to protect continuity of services, or about its prices to support tariff calculation.

819. Information might be needed from providers who are currently exempted from licensing if, for example, Monitor and the NHS Commissioning Board decided to extend the scope of tariff pricing to a new service, and needed information on the prices of these services to do so.

Section 105 - Discretionary requirements

820. ‘Discretionary requirements’ are obligations which Monitor may place upon a provider of NHS services if it breached a licence condition, or failed to hold a licence when it is required to; or on any person who failed to provide Monitor with information under the previous section. Discretionary requirements are intended to act as an incentive to comply and a means of rectifying any problems.

821. *Subsection (2)* outlines the types of discretionary requirements that Monitor may impose. They are:

- a monetary penalty of such amount as Monitor may determine, up to 10% of turnover of the person in England (‘variable monetary penalty’);
- action to cease the breach in question, or make sure it did not continue or happen again (‘compliance requirement’). An example of this might be a requirement that a provider cease plans to dispose of an asset that was needed for the provision of a service, the continuity of which was required, or to take action to mitigate financial risk (in breach of a condition relating to financial viability) that would threaten the continuity of such services;
- action to restore the position to what it was before the breach occurred (‘restoration requirement’). For example, Monitor could require that a provider re-open a service that it had closed in breach of a licence condition.

822. The Secretary of State is given power by regulations to prescribe how turnover would be calculated for the purposes of the 10% limit on variable monetary penalties (*subsection (4)*).

823. *Subsection (3)* provides that Monitor must not impose discretionary requirements on a provider on more than one occasion in relation to the same breach, but Monitor may, however, take action to enforce the discretionary requirements it has imposed on a provider to remedy such a breach.

824. *Subsection (5)* provides that a penalty imposed under this section that is not paid in full accrues interest, but the total amount of interest charged may not exceed the amount of the penalty itself.

Section 106 - Enforcement undertakings

825. ‘Enforcement undertakings’ are settlements offered by a person to rectify one or more breaches for which Monitor would otherwise be able to impose a discretionary requirement. Monitor could choose whether to accept the offered settlement, based on whether it was likely to constitute an appropriate remedy. This alternative to discretionary requirements provides an incentive for providers and others to take responsibility for proposing solutions to problems, and thus to be proactive about remedying breaches.

826. *Subsection (3)* specifies what types of enforcement undertakings Monitor may accept:

- action to cease the breach or to prevent the breach continuing or happening again;

*These notes refer to the Health and Social Care Act 2012
(c.7) which received Royal Assent on 27 March 2012*

- action to restore the position to what it would have been before a breach occurred, so far as is possible;
- action to benefit any licence holder or commissioner affected by a breach, which could be payment of money; or
- other action as may be specified in regulations.

827. Once Monitor accepts an enforcement undertaking, it may only impose a discretionary requirement or revoke a licence if the licensee fails to comply with the undertaking, or any part of it (*subsection (4)*). *Subsection (5)* provides that where a provider has partially complied with an undertaking, Monitor must take the partial compliance into account when deciding whether to take further enforcement action.

Section 107 - Further provision about enforcement powers

828. This section gives effect to Schedule 11, which provides further detail about both discretionary requirements and enforcement undertakings.

Schedule 11 - Further provision about enforcement powers

Part 1 - Discretionary requirements

Procedure

829. The procedure for discretionary requirements follows that laid down in section 43 of the Regulatory Enforcement and Sanctions Act 2008.

830. [Paragraph 1](#) requires Monitor to give notice to a person of its intention to impose a discretionary requirement on them. The notice must provide specified details, including the grounds for the proposal to impose the requirement, and the notice period within which the person could make written representations, which must be at least 28 days, except where Monitor considers a shorter period is necessary to avoid or minimise further breaches of licence conditions. In these circumstances, Monitor may shorten the notice period, but not to less than five days. A shorter period might be necessary to, for example, require a provider of services subject to continuity of service conditions who had stopped providing those services, to restore them, where continuity of those services was required.

831. [Paragraph 2](#) provides that where, following expiry of the notice period, Monitor decides to impose a requirement, a second and final notice must be given to the person involved. This must include information about why the requirement is being imposed, the implications of failure to comply with the requirement, details of how any monetary penalty is to be paid and of the rights of appeal.

832. If Monitor wishes to impose a variable monetary penalty, it must give notice of this under paragraph 1 within five years of the breach occurring.

833. A person on whom Monitor imposes a discretionary requirement is able to appeal to the First-tier Tribunal ([paragraph 3](#)). During an appeal, the duty to fulfil the discretionary requirement(s) being appealed is suspended. There are a number of grounds for appeals:

- that the decision was based on a factual error;
- that the decision was wrong in law;
- that the amount of a variable monetary penalty was unreasonable;
- that action required by Monitor was unreasonable (in the case of either compliance requirements or restoration requirements);
- that the decision was unreasonable for any other reason.

834. [Paragraph 3\(4\)](#) specifies the measures the First-tier Tribunal may take following the appeal. It could confirm or withdraw the requirement in question, or vary it. Alternatively, the Tribunal has the same powers to act in relation to the breach(es) that gave rise to the appeal as Monitor has in relation to them. The third option is for the First –tier tribunal to remit the decision, or any matter relating to it, to Monitor for reconsideration.
835. [Paragraph 4](#) gives Monitor specific powers to withdraw or amend discretionary requirements that it has imposed.

Non-compliance penalties

836. [Paragraph 5](#) gives Monitor the power to impose a monetary penalty (a “non-compliance penalty”) on a person who fails to comply with a compliance or restoration requirement, and to determine the amount of the monetary penalty. When proposing to impose such a penalty, Monitor must serve a “non-compliance notice” on the person concerned. This must include details of the monetary penalty and how and when it was to be paid, the grounds for imposing the penalty, the consequences of failing to pay the penalty and the right of appeal.
837. The period for payment must not be less than 28 days from the day after the date on which the notice is received. If the person on whom the notice was served complied with the compliance requirement within that period, the payment would cease to be due. If the person does not pay the fine within the specified payment period, Monitor may increase the non-compliance penalty by no more than 50%.
838. The grounds on which a person served with a non-compliance penalty could appeal to the First-tier tribunal are set out in paragraph 6(2). Penalties are suspended whilst an appeal was in progress. The Tribunal may confirm, change or withdraw a non-compliance penalty, or remit the decision to Monitor for reconsideration.

Recovery of financial penalties and payments of penalties etc. into Consolidated Fund

839. Both variable monetary penalties and non-compliance penalties are recoverable summarily as a civil debt (paragraph 7). Monitor must pay money it received from penalties into the Consolidated Fund: it would not retain any element of the fines it imposed (paragraph 8).

Part 2 – Enforcement undertakings

Procedure

840. [Paragraphs 9](#) and [10](#) stipulate that Monitor must consult upon and then publish a procedure for entering into enforcement undertakings. It may revise that procedure but it would have to publish any revision. Monitor must also publish details of each enforcement undertaking it accepted, but with any commercial information or information that Monitor considered would or might harm any person’s legitimate business or personal interests redacted (paragraph 10).

Variation of terms

841. A person giving an enforcement undertaking and Monitor may agree to vary the terms of an enforcement undertaking. This is intended to provide the flexibility to alter the agreement if necessary if, for example, a provider had good reasons for taking longer to carry out a remedial measure than was originally planned and agreed.

Compliance certificates

842. If it is satisfied that a person had complied with an enforcement undertaking, Monitor must issue a compliance certificate (paragraph 12). Someone who had given an enforcement undertaking may apply for a certificate at any time.
843. [Paragraph 13](#) provides that an appeal to the First-tier Tribunal may be made against a decision of Monitor to refuse an application for a compliance certificate, on the grounds that the decision was based on an error in fact, was wrong in law, or was unfair or unreasonable. The Tribunal may confirm Monitor's decision or decide that it did not have effect.

Inaccurate, incomplete or misleading information

844. If Monitor is satisfied that information supplied by a person in relation to an enforcement undertaking is inaccurate, misleading or incomplete, Monitor may treat the person as having failed to comply with the undertaking. If it did this, Monitor would have to revoke any compliance certificate given to that person in connection with the particular undertaking.

Section 108 - Guidance as to use of enforcement powers

845. This section requires Monitor to consult on and publish guidance about the way in which it will exercise its powers to impose discretionary requirements and to accept enforcement undertakings (*subsection (1)*). *Subsection (5)* provides that Monitor must have regard to the published guidance in exercising those powers. Guidance would give licensees and others a better understanding of the enforcement action that Monitor is likely to take in particular circumstances.
846. *Subsection (4)* provides that the guidance must include details of when Monitor is likely to impose a discretionary requirement and when it may not impose one, how it will decide the amount of variable monetary penalties, and how decisions may be appealed.

Section 109 - Publication of enforcement action

847. *Subsection (1)* provides that Monitor must include information in its annual report on discretionary requirements it has imposed and enforcement undertakings it has accepted during the financial year that the report covers. Under *subsection (2)* Monitor is not able to include information if it is satisfied that publication of it would or might significantly harm the legitimate business or personal interests of the person to whom the information relates.
848. *Subsection (3)* provides that Monitor is not to include in the report information about discretionary requirements that have been overturned on appeal.

Section 110 - Notification of enforcement action

849. This section provides that Monitor must notify the NHS Commissioning Board, affected CCGs and other relevant regulators of discretionary requirements it imposes and enforcement undertakings it accepts. This provision is designed to ensure that information about provider performance, which may be relevant to the duties and functions of commissioners and other regulators, is shared appropriately.

Transitional provision

Section 111 - Imposition of licence conditions on NHS foundation trusts

850. This and the following three sections provide Monitor with transitional intervention powers over all NHS foundation trusts.

851. *Subsections (1) and (2)* provide transitional powers for Monitor to impose such requirements on a foundation trust (in the form of additional licence conditions), as Monitor considers appropriate, to address a governance failing. Monitor can impose such requirements where it is satisfied that this is necessary to prevent or remedy a breach of a foundation trust's licence. *Subsection (1)* allows Monitor to impose licence conditions relating to governance on a foundation trust where it is satisfied that the governance of the trust will cause it to fail to comply with its licence conditions to provide NHS services. *Subsection (2)* specifies that the circumstances in which these powers may be used include those where the trust's directors, governors, or both, are failing to comply with conditions in the trust's licence, or are failing to reduce the risk of a breach of licence conditions. Monitor's transitional powers are intended to provide an additional safeguard to protect patients' interests by ensuring that foundation trusts are well-governed and exercise their functions consistently with their duty to do so effectively, efficiently and economically, in the early years of the new regulatory regime, when some foundation trust governors may be inexperienced and when some foundation trusts may be newly authorised.
852. *Subsection (3)* provides that any additional licence conditions imposed by Monitor under subsection (1) could continue in force until Monitor's transitional powers were repealed by Parliament by virtue of section 112.
853. *Subsections (5) and (6)* provide Monitor with further powers to take action where a foundation trust fails to comply with Monitor's requirements under subsection (1). Specifically, Monitor could intervene to require the trust to remove, replace on an interim basis, suspend or disqualify one or more directors or governors of the trust. If the trust failed to do so, Monitor could take such action itself.
854. *Subsection (7)* provides that Monitor's exercise of its transitional powers in subsection (5) is without prejudice to its ability to exercise powers to set and enforce requirements on foundation trusts, including requirements relating to governance, or requirements to ensure a foundation trust's continued ability to provide services for the purpose of the NHS. This clarifies that the transitional powers are in addition to Monitor's continuing non-transitional powers to intervene where a licence holder is in breach of licence conditions, for example, a requirement to maintain continuity of NHS services.
855. *Subsection (11)* repeals section 52 of the NHS Act (failing NHS foundation trusts) because Monitor will have permanent powers to protect the continuity of services through the modified regime for unsustainable foundation trusts. It also makes related consequential amendments.

Section 112 – Duration of transitional period

856. This section makes all foundation trusts subject to Monitor's transitional powers until the Secretary of State makes an order to release either some or all trusts from the powers. The first such order may not be made before 1 April 2016, or, in the case of a foundation trust authorised after 1 April 2014, before two years after the date of authorisation. The order would be subject to Parliamentary scrutiny under the negative resolution procedure, since those trusts being considered for release would have effective governance and would therefore be at low risk of needing intervention.
857. *Subsection (5)* provides for the section to be repealed when there are no longer any foundation trusts or NHS trusts which might become foundation trusts to which the powers might apply.

Section 113 – Orders under section 112: criteria for deciding applicable trusts

858. This section sets out the process to be followed when the Secretary of State decides to make an order to release foundation trusts from Monitor's transitional intervention

powers. *Subsection (1)* provides that the Secretary of State must notify Monitor where he proposes to make an order releasing trusts from the powers in this way.

859. *Subsection (2)* provides that, where Monitor receives a notification under subsection (1), it must develop criteria to decide which foundation trusts should be released from its transitional intervention powers. *Subsection (3)* requires Monitor to consult the Care Quality Commission and other appropriate persons and to obtain the Secretary of State's approval for the criteria before applying them.
860. *Subsection (4)* requires that, following approval by the Secretary of State, Monitor must publish the criteria. Monitor must apply the criteria to decide which foundation trusts should be released from the transitional intervention powers. Monitor must notify the Secretary of State about which foundation trusts it has determined should be released from the transitional powers and publish a list of those trusts.
861. *Subsection (5)* provides for a situation where the Secretary of State did not approve the criteria developed by Monitor under subsection (2). Monitor would have to propose revised criteria to the Secretary of State and repeat the process in subsections (3) and (4).
862. *Subsection (6)* requires the Secretary of State, on receiving notification from Monitor under subsection (4), to review Monitor's determination about the trusts to be released.

Section 114 - Repeal of sections 112 and 113

863. This section repeals the previous two sections when section 111 (Imposition of licence conditions on NHS foundation trusts) on transitional intervention powers is repealed. That section is repealed when it no longer has any effect in relation to any foundation trusts and there are no NHS trusts left in existence.

Chapter 4 – Pricing

864. These sections set the framework for setting prices for health care services provided for the purposes of the NHS.

Section 115 - Price payable by commissioners for NHS services

865. This section makes provision about how prices are to be determined for the provision of health care services for the purposes of the NHS. *Subsection (1)* makes provision for prices to be set out in a national tariff (national prices) and *subsection (2)* provides that where a service is not included in the national tariff, the price payable is to be determined in accordance with any rules set out in the tariff to cover such circumstances.
866. The commissioners with an interest in pricing under this Chapter are those arranging for the provisions of health care services for the NHS which are the NHS Commissioning Board, CCGs, and the Secretary of State where section 13Z2 (failure by the Board to discharge any of its functions) of the NHS Act applies. The Secretary of State's power under section 13Z2 applies where the Commissioning Board is failing or has failed to discharge, or to properly discharge, any of its functions.

Section 116 - The national tariff

867. This section requires Monitor to publish "the national tariff", a document that makes provision about pricing of health care services for the purposes of the NHS. *Subsection (1)* provides that the national tariff must:
- specify the health care services to which it applies. The tariff would include 'currencies' (i.e. the service specification which may include one or more component health care services) that would be used as the basis for pricing and payments;

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(c.7) which received Royal Assent on 27 March 2012*

- specify the methodology (or methodologies) that had been employed by Monitor for determining the prices payable under the national tariff (which may be different for different descriptions of services). The methodology would include the input data as well as the process of calculation for determining the prices payable under the national tariff;
 - specify the prices payable for those services, subject to any adjustments that may be provided for under this Chapter;
 - specify a methodology to be used by Monitor when considering agreements under section 124 or applications under section 125 for the local modification of prices payable under the national tariff.
868. *Subsections (2), (4)(b), (4)(c) and (6)* make provision for rules which may be included in the national tariff providing for:
- providers and commissioners to agree to vary the prices payable under the national tariff or the specification of a health care service specified in the national tariff (*subsection (2)*). The intent is to enable flexibility to be provided within the national tariff, for example, to support innovation in service delivery, integration of services, or unbundling of services to enable components of care to be delivered and paid for separately, where this would be in patients' best interests. Where such variations are agreed, the commissioner is required by *subsection (3)* to keep and publish a written statement of all such variations;
 - determining prices payable for services not specified in the national tariff, (local price setting rules) where the prices payable would otherwise, in the absence of such rules, be agreed locally between commissioners and providers (*subsection (4)(b)*);
 - the determination of which 'currency' (see paragraph 832 above) applies where a service is specified in more than one way under the national tariff, or under any local price setting rules (*subsection (6)*); and
 - governing the making of payments to the provider (*subsection (4)(c)*).
869. *Subsection (5)* provides that local price setting rules under subsection (4)(b) may also include the specification of currencies for health care services which are not specified under subsection (1)(a). This provision would allow standard currencies to be specified at a national level, where the prices are to be determined locally. This would support expansion in the range of services covered by the national tariff over time, where this would be in patients' best interests.
870. *Subsection (4)(a)* provides that the national tariff may also specify variations to the national prices for a service based on the circumstances in which that service is provided or any other factors relevant to providing that service, for example, to take account of whether the service is provided in a hospital setting or in a patient's home, or to take account of clinical complexity.
871. *Subsection (7)* provides that the national tariff may include guidance on: the application of any rules included in the national tariff (except rules on making payments to providers); the discharge of the duty under subsection (3) to publish variations agreed between the provider and commissioner under any such rules; and, the application of variations in the national tariff made in accordance with subsection (4) (a). Commissioners must have regard to any guidance provided.
872. *Subsection (8)* provides that the national tariff may specify different prices payable, or variations of the prices payable, for a specified health care service (or services of a specified description) to different types of provider. However, the different prices payable, or variations of the prices payable, could not be based on whether the provider is in the public or private sector or any other aspect of the status of the provider (*subsection (10)*). For example, a differential price could be specified for providers in

central London due to the additional costs of land and buildings but the prices payable cannot be based on whether the provider is public or private sector. Prices specified in the national tariff would not be able to include prices for public health services.

873. *Subsection (12)* provides that the national tariff has effect for the period specified in the tariff or until a new edition of the tariff takes effect.
874. *Subsection (13)* requires Monitor to have regard to the mandate set by the Secretary of State (published under section 13A (mandate to the Board) of the NHS Act) when carrying out its pricing functions under this Chapter.

Section 117 – The national tariff: further provision

875. This section provides that the specification of a health care service in the national tariff or as determined by local price setting rules can take any form, including describing a service:
- by reference to one or more of its individual components;
 - as a “bundle” of services constituting a course of treatment; or
 - as a group of services.
876. *Subsection (2)* provides that where the service is specified in the national tariff by reference to its components, the tariff must specify the prices payable for each component. If two or more services are bundled, the tariff must determine the prices payable for the bundle as a whole. Where services are grouped, the tariff would determine the single price for the provision of any service listed in the group (in other words, the same price would apply to each service listed).
877. *Subsection (3)* provides that where a service is specified under local price setting rules, the national tariff may include rules to determine the price for each component or bundle, or the price that would apply to each service specified within a defined group of services.
878. *Subsection (4)* provides for Monitor to direct a commissioner to reverse actions taken where the commissioner agrees to pay a price other than the price payable under the national tariff. Under *subsection (5)* Monitor may direct the commissioner to take steps to prevent recurrence of a failure to comply with rules in the national tariff (for varying a service specification or price, for local price setting, as to payments, or for determining which specification should apply where a service is specified in different ways), or to restore the position to what it would have been had the failure not occurred.

Section 118 - Consultation on proposals for the national tariff

879. The national tariff must include certain elements and *subsections (7), (8) and (9)* require that Monitor and the NHS Commissioning Board agree those elements. The proposals for these elements must be included in a notice published and sent to all commissioners, relevant providers and other persons considered appropriate (*subsection (1)*). The elements are:
- the health care services to which the national tariff would apply, including the ‘currencies’ or units of services for which there are prices specified in the national tariff;
 - the methodology (or methodologies) for determining the prices payable for those services, which would include the input data and the processes of calculation for determining the prices payable under the national tariff;
 - the prices payable for those services, including any provision for adjustments that Monitor and the NHS Commissioning Board have agreed should be applicable;

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- the methodology to be used by Monitor when considering an agreement for a price modification under section 124 or an application for a price modification under section 125.
880. The national tariff may also include other elements. If they are included *subsections (10), (11) and (12)* require that Monitor and the NHS Commissioning Board must also agree those elements and that the proposals for them must be included in the notice published under subsection (1)). These could be:
- variations on the prices payable and any associated guidance;
 - rules under which providers and commissioners could agree to vary the prices payable under the national tariff and any associated guidance;
 - rules for determining prices payable locally for services not specified in the national tariff and any associated; and
 - rules for determining which ‘currency’ (see paragraph 832 above) applies where a service is specified in more than one way, either for the purposes of determining the prices payable under the national tariff, or under any rules for the purposes of determining the prices payable for services where such prices are to be determined locally, and associated guidance.
881. If agreement cannot be reached between Monitor and the NHS Commissioning Board in respect of any of the components of the national tariff to be published under this section, those matters will be determined by independent arbitration .
882. Once agreement has been reached, Monitor must notify all commissioners, relevant providers and others it considers appropriate (for example providers not currently providing NHS services) of the proposed national tariff and the proposals for the components as required or otherwise provided for in this section. The proposals must also be published (*subsection (2)*). There must be a 28-day consultation period, during which objections could be made (*subsection (13)*).

Section 119 - Consultation: further provision

883. *Subsection (1)* of this section places a duty on Monitor and the NHS Commissioning Board, in ensuring that the prices set under the previous section represent fair reimbursement for providers of services, to have regard to the differential costs incurred by providers who treat different types of patient and differences between providers with respect to the range of services they provide. The effect of this is to require Monitor and the Board to make provision for adjustments in the prices payable under the national tariff, or within the rules for determining the prices payable locally, to take account of variations in clinical complexity.
884. *Subsections (2) and (3)* of this section state that when developing standard currencies or units of service to be included in the national tariff for determining the prices payable, or in any rules governing local prices, the Board and Monitor must act with a view to securing standardisation of currencies across England.
885. *Subsection (4)* provides that when the Board and Monitor are developing standard currencies or units of service for determining the prices payable, they must consider whether such standardisation will have any significant adverse impact on the provision of health care services for the NHS.

Section 120 - Responses to consultation

886. This section sets out the process for commissioners and relevant providers to challenge the methodology (or methodologies) proposed for determining the prices payable under the national tariff. Where an objection is made, Monitor may confirm the national tariff only if either: the conditions in *subsection (2)* of this section are met or, if they

are not met, following a reference to the Competition Commission. The Competition Commission would be required to determine if the methodology is appropriate having regard to Monitor's duties under this Act and in accordance with the provisions of this Chapter.

887. The conditions in subsection (2) are that the percentage of commissioners or relevant providers who object to the pricing methodology (the objection percentage), or, as may be prescribed in regulations made by the Secretary of State, the percentage of relevant providers weighted by their share of supply (the share of supply percentage) who objected to the pricing methodology, are both less than the prescribed percentages. The regulations may include provision about the method for determining share of supply.
888. This section also gives effect to Schedule 12, which makes provision about the procedure for references by Monitor to the Competition Commission, in circumstances where the objection percentage and/or the share of supply percentage, as may be prescribed, were met and about how the Commission should handle any such references.

Schedule 12 - Procedure on references under section 120

889. This Schedule provides that, in making a reference to the Competition Commission, Monitor must outline its reasons for the proposed pricing methodology. Monitor also has to include the reasons for considering that there are no grounds for the Commission to determine that the proposed methodology is inappropriate. The grounds on which the Commission could make such a determination are set out in section 121(4). Monitor must send a copy of any reference to the NHS Commissioning Board and to those persons (i.e. relevant providers or CCGs) who had objected to the proposed methodology (paragraph 1(2)). Those persons can make representations to the Competition Commission about Monitor's reference, within 10 days of receiving the copy of the reference. A person who makes a representation must provide Monitor with a copy. Monitor may reply to the representations, within 10 days of receiving its copy; and, if it chooses to do so, must send the person a copy of that reply (paragraph 2).
890. On receipt of a reference, the Chairman of the Commission is required to select a group to consider the reference, make a determination and give any directions to Monitor to give effect to the determination (sub-paragraph (1) of paragraph 3). Sub-paragraphs (2) to (6) of paragraph 3 make provision about the constitution of the group, including that it must comprise three members of the Commission. Sub-paragraph (7) provides that a decision of the group will only be effective if all members are present when the decision is made and two of the three members are in favour of the decision.
891. The Competition Commission may make rules on the procedure to be followed in making determinations on references (paragraph 11). In particular, this could include time limits for oral evidence. Any rules must be published.
892. [Paragraph 4](#) makes provision about the timetable for references. The group must make a determination within 30 working days of the last date on which Monitor is entitled to respond to the objectors.
893. The group may extend the deadline by not more than 20 working days and not more than once. The Competition Commission would have to notify the extension to Monitor, the NHS Commissioning Board and those persons who had objected.
894. [Paragraph 5](#) provides that the group may disregard:
- any representations from a person not raised by that person in the original consultation; and/or
 - any matter Monitor raises in a reply to a representation from a person that is not included in the original reference, if it considered this necessary to secure a determination within the permitted timescales.

895. Paragraphs 6 to 8 make provision to enable the Commission to require information in order to help it make its determination. The information could take the form of documents, evidence at oral hearings or written statements. Paragraphs 9 and 10 make provision relating to evidence, including provision about default. A failure to provide information or the provision of false information is to be regarded as a contempt of court. However, no person could be compelled to provide information that it could not be compelled to under civil proceedings in the High Court.
896. Under paragraph 12, the unsuccessful party must pay the costs the Competition Commission incurs in making a determination on a reference. If the Commission determines that the proposed pricing methodology should be changed, Monitor must pay the Commission's costs. If the Commission determines that the proposed methodology may be implemented without changes, those persons who had objected may be named as those required to pay the Commission's costs. This provision is intended to deter persons from objecting unless they have good reason to do so and to help ensure that Monitor makes sensible and appropriate proposals for pricing methodologies.

Section 121 - Determination on reference under section 120

897. This section provides that in making a determination on the pricing methodology, the Competition Commission must have regard to the matters to which Monitor must have regard in carrying out those of its functions to which the determination relates.
898. In reaching its determination, the Commission must have regard to any representations made to it by relevant providers or commissioners who had objected to the methodology, under the procedure set out in paragraph 2 of Schedule 12. The Commission may also consider matters that Monitor was not able to take into account, provided the nature of them was such that Monitor would have been entitled to take them into account had it had the opportunity. This provision would enable the Commission to take account of new information that was not available to Monitor when it proposed the pricing methodology, but which was relevant.
899. If the Commission determines that Monitor has set the pricing methodology appropriately, Monitor can use that method.
900. The Commission could determine that Monitor had not set the pricing methodology appropriately only in the circumstances set out in *subsection (4)*. Those circumstances are that Monitor has failed to have regard to matters relating to pricing methodology to which it is required to have regard; or that the decision is based on an error of fact or wrong in law. Where any of these apply, the Commission must refer the methodology back to Monitor for re-consideration, with the reasons for its decision. The Commission would be required to notify its determination to Monitor, the NHS Commissioning Board and those relevant providers or commissioners who made representations to it; and to publish it, excluding any commercial information that could damage an undertaking's interests or information relating to the private affairs of an individual that could harm that person's interests.

Section 122 - Changes following determination on reference under section 120

901. Where the Competition Commission refers a proposed pricing methodology back to Monitor, Monitor must make any changes it considered necessary to address the issues raised in the Competition Commission's determination. Monitor must notify the Competition Commission and the NHS Commissioning Board of the changes it proposes to make and its reasons for them.

Section 123 - Power to veto changes proposed under section 122

902. Within 28 days of receiving notification under section 122 of Monitor's proposed changes, the Commission can direct Monitor not to implement some or all of those

changes. When issuing such a direction, the Commission must give notice of the terms of the direction and the reasons for it, and make the necessary changes to the pricing methodology itself. This power of veto is to give the Commission the opportunity, where it considered this necessary, to prevent Monitor from making changes that do not deal adequately with the Commission's determination on a reference.

903. The Commission could apply to the Secretary of State for an extension of the 28-day period by 14 days.
904. Before making the changes to the pricing methodology, the Commission would have to notify Monitor and the NHS Commissioning Board of those changes including the Commission's reasons for the changes it proposes to make (*subsection (7)*). It must provide a period of at least 28 days for representations (*subsection (8)*).
905. If the Competition Commission does not issue a direction to Monitor under this section, section 122(3) requires Monitor to make the changes it has proposed.

Section 124 - Local modifications of prices of services: agreements

906. This section specifies the process for a provider of a health care service for the purposes of the NHS and the relevant commissioner to agree a modification of prices payable in accordance with the national tariff (*subsection (1)*). This may be necessary where an efficient provider cannot recover their costs at the prices determined in accordance with the tariff, for example, due to the services required by commissioners being of relatively small scale such as may be the case where a provider is required to sustain provision of Accident and Emergency or maternity services in a relatively less populated area of the country. Monitor may approve any such modification if, applying the methodology agreed with the NHS Commissioning Board and published in the national tariff under subsection 116(1)(d), it is satisfied that it would be uneconomic for the provider to provide the service (*subsection (5)*). Monitor can require evidence in support of an application for a modification (*subsection (4)*).
907. Where Monitor approves an application, it must notify the Secretary of State and those CCGs, providers and others whom it considers appropriate, as well as publishing details of the modification and the date on which it takes effect (*subsections (6) to (8)*).
908. The Secretary of State may direct that an agreement is to be of no effect, if the Secretary of State thinks that the agreement might breach EU obligations (for instance, state aid rules) (*subsection (9)*).

Section 125 - Local modifications of prices of services: applications

909. This section deals with situations in which agreement to a local modification under section 124 is sought by a provider but not agreed with the commissioner(s). In such circumstances, the provider in question may make an application to Monitor for a modification of the prices payable in accordance with the national tariff, which must be supported by such evidence as Monitor may require (*subsections (1) and (2)*). If Monitor decided it would be uneconomic for the provider to continue to provide the services as required by the commissioner(s) without modification of the prices payable, Monitor can grant the application and determine the modification to the price that would apply (*subsection (3)*). In considering an application for such a modification, Monitor must apply the methodology agreed with the NHS Commissioning Board and published in the national tariff under subsection 116(1)(d) and can require evidence in support of an application for a modification. Monitor would have to give notice of any such decision in accordance with *subsections (6) to (8)*.
910. The Secretary of State may direct that a modification contained in an application under this section is to be of no effect, if the Secretary of State thinks that the modification might breach EU obligations (for instance, state aid rules) (*subsection (9)*).

Section 126 – Applications under section 125: notification of commissioners

911. This section provides for action to be taken by Monitor where it has identified significant risk to the continuity of NHS services as part of its consideration of an application for modification of the prices payable under the national tariff (*subsections (1)*). It obliges Monitor to notify the NHS Commissioning Board and certain CCGs where it has identified such risks and is satisfied that this was attributable to the way in which services were configured.
912. *Subsection (3)* requires Monitor to notify the NHS Commissioning Board and such CCGs as Monitor considers appropriate where:
- a) a provider of NHS health care services applies to Monitor for a modification to the tariff price, under section 126 (where the provider has previously been unable to agree a modification with the commissioner of the health care services in question), and
 - b) Monitor is satisfied that an unsustainable configuration of certain health care services is putting services subject to a licence condition under section 97(1)(i), (j) or (k) (for the purpose of ensuring the continuity of those services) at significant risk.
913. *Subsection (4)* requires Monitor to publish an annual list of the notifications it has sent to commissioners regarding unsustainable service configurations and a summary of its reasoning in each case.
914. *Subsection (5)* requires the Board and CCGs to have regard to any such notification received when arranging for the continued provision of NHS health care services. It would be for commissioners to decide what action to take to address any unsustainable configuration of services, in consultation with Local Health and Well-being Boards.

Section 127 - Correction of mistakes

915. If a mistake in the national tariff means that it does not reflect what Monitor and the NHS Commissioning Board have agreed (or what has been determined by arbitration), corrections may be made. Monitor must notify all commissioners, licence holders and other persons as it considers appropriate of the mistake and the correction and specify the date on which the correction would take effect (which could be before the notification).

Chapter 5 – Health special administration

916. This Chapter provides for a health special administration regime, based on insolvency legislation, for the purposes of securing the continued provision of NHS services provided by a company that becomes insolvent. The regime is intended to enable commissioners to secure continued access to NHS services to meet the needs of their communities.
917. Health special administration provides an alternative to the corporate insolvency procedures set out in the Insolvency Act 1986 that would otherwise apply if a company providing NHS services becomes insolvent.
918. The health special administration regime applies only to “relevant providers” which are defined as companies providing NHS services to which licence conditions have been applied by Monitor for the purposes of ensuring continuity of NHS services. Part 4 of the Act makes separate provision for trust special administration for unsustainable foundation trusts, including arrangements for securing continuity of NHS services in line with requirements determined by commissioners.

919. **Chapter 6** makes provision about financial assistance in cases of health special administration or trust special administration (for NHS foundation trusts under Chapter 5A of Part 2 of the NHS Act).

Section 128 - Health special administration orders

920. Health special administration could commence only by an order of the court on an application made by Monitor.
921. A health special administration order may only be sought against a company providing NHS services that is subject to specific licence conditions set by Monitor, under section 97(1)(i), (j) or (k), that relate to the continued provision of NHS services. Section 130 makes provision for the health special administration regulations to set out requirements for Monitor to publish and maintain details of relevant providers that are potentially within the scope of the health special administration regime.
922. Where the court makes a health special administration order, a health special administrator is appointed (*subsection (1)*). The health special administrator is an officer of the court and in carrying out their functions acts as the company's agent (*subsection (4)*). Only a qualified insolvency practitioner could be appointed as a health special administrator (*subsection (5)*).
923. Under *subsection (6)* the health special administrator is obliged to manage the affairs, business and property of the provider to achieve the objective of health special administration as quickly and efficiently as reasonably practicable.
924. In doing so, the health special administrator must ensure that the provider continues to comply with the requirements and conditions of the Care Quality Commission's provider registration regime (provided for in Part 1, Chapter 2 of the Health and Social Care Act 2008).
925. The health special administrator is also required to act in a manner that, insofar as it is consistent with the objectives of a health special administration, protects the interests of the creditors of the provider as a whole, and, subject to those interests, the interests of its members.

Section 129 - Objective of a health special administration

926. *Subsection (1)* provides that the objective of health special administration is to secure the continued provision of certain NHS services provided by relevant providers, so that it becomes unnecessary for the health special administration order to remain in place. These services are those determined by the relevant commissioners in accordance with the criteria set out in the health special administration regulations.
927. *Subsection (2)* provides that the objective of health special administration may be achieved by either rescuing the provider as a going concern, so that it was able to continue in business, and/or the transfer of all or some of the services it provided to one or more alternative providers.
928. The section provides for a hierarchy in these two possible outcomes. The health special administrator is required to work towards rescuing the company as a going concern, under *subsection (5)*, and may only make transfers to the extent that:
- a rescue is not reasonably practicable at all or without the transfer of some services;
 - a rescue would not achieve the objective of health special administration or would not do so unless services were transferred;
 - transfers would produce a better result for the company's creditors as a whole; or
 - transfers would produce a better result for members without prejudicing the interest of creditors.

Section 130 - Health special administration regulations

929. *Subsection (1)* requires the Secretary of State to make regulations setting out the detail of the health special administration regime. The regulations will be subject to consultation and the affirmative resolution procedure in Parliament.
930. These provisions are designed so that health special administration can reflect existing insolvency law and practice. *Subsection (2)* provides that the regulations may apply, with modifications, the procedure of administration set out in Part 2 of the Insolvency Act 1986 (which includes provision for the powers of administrators and the process of administration) and other relevant legislation.
931. The regulations may also include provision for enabling the court to make a health special administration order if the Secretary of State presents a public interest winding-up petition in relation to a relevant provider (*subsection (3)*).
932. The regulations may make provision about the application of other corporate insolvency procedures and the enforcement of security over property, in the context of health special administration.
933. The regulations may set out requirements for Monitor to publish and maintain details of companies that are potentially within the scope of the health special administration regime (*subsection (5)*).
934. *Subsection (6)* provides that the regulations may also set out further details about health special administration. In particular, such regulations may make provision for Monitor to issue guidance to commissioners about the exercise of their functions in determining the services which are to be subject to health special administration.
935. The regulations may require Monitor to publish such guidance, enable Monitor to revise it and require that any such guidance or revised guidance is approved by the Secretary of State and NHS Commissioning Board before it is published. The regulations may also require commissioners to have regard to any such guidance issued by Monitor. Where commissioners exercising those functions fail to reach agreement, the regulations may make provision for the NHS Commissioning Board to facilitate agreement or to exercise the commissioners' functions in order to determine the issue where agreement cannot be reached. The intention is that any such provision will apply where a relevant provider delivers services to more than one commissioner.
936. The regulations may also require a health special administrator to carry out consultation, in accordance with the regulations, on the actions they recommend in relation to a particular provider.
937. *Subsections (7) and (8)* provide that the regulations could also modify this Chapter, the Insolvency Act 1986 and any other enactment which either makes provision about what is to be done under that Act or is relevant to insolvency or administration. This ensures that the health special administration regime may be tailored to meet the needs of the health care sector.
938. *Subsection (9)* provides that further secondary legislation ('rules') may be made under section 411 of the Insolvency Act 1986 to give effect to the health special administration regime. This is consistent with other insolvency regimes, where rules provide the details needed to make the procedures workable in practice. The rules would be made in the normal way and the power to make rules in relation to Scotland is exercisable by the Secretary of State (*subsection (10)(b)*). Rules made under this provision would apply to any Scottish companies providing NHS services in England.

Section 131 - Transfer schemes

939. This section allows for health special administration regulations to make provision about the transfer of NHS services to another provider in order to achieve the objective of health special administration.
940. In particular, the regulations may include provision for the transfer of property, rights and liabilities, including the transfer of rights that individuals might have through their contracts of employment, to alternative providers. The regulations may also require that Monitor and relevant providers agree transfer schemes in individual cases, allow Monitor to modify a transfer scheme with the consent of the affected parties, and allow for modifications to a transfer scheme to have effect from a time specified by Monitor.

Section 132 - Indemnities

941. This section enables the health special administration regulations to make provision for Monitor to provide appropriate indemnities in respect of liabilities incurred or loss or damage sustained in connection with the exercise of the health special administrator's functions. Any such indemnity would be paid out of the financial mechanisms established under Chapter 6.

Section 133 - Modification of this Chapter under the Enterprise Act 2002

942. This is a technical provision that would allow the Secretary of State to make consequential amendments under specified sections of the Enterprise Act 2002 to the provisions of this Chapter. This is to enable future changes to the health special administration regime, to keep it in line with changes in the underlying insolvency legislation.

Chapter 6 – Financial assistance in special administration cases

943. These sections require Monitor to set up effective mechanisms for providing financial assistance to providers in health special administration. This means companies in health special administration and NHS foundation trusts in trust special administration. Funding would be issued to the special administrator and could be used to finance the costs of ensuring the continuity of NHS services, both to meet the costs maintain continuity of services during a period of administration and to fund any one-off costs of securing continuity of NHS services upon exit from special administration. The intention is that providers and commissioners of such services will fund this financial assistance through financial contributions, or other financial mechanisms, determined by Monitor, for example, on the basis of risk. The Government expects that one effect of the new arrangements will be to shift the burden of funding unsustainable providers away from high-performing commissioners and providers. Under the current arrangements, the NHS has typically funded the costs of failure through the re-allocation of surplus funding, generated by efficient provision, or by clawing-back funding from allocations to commissioners. Monitor will decide the detail of the new financial mechanisms, but the Government expects it will take account of the risks presented by individual providers and the extent to which commissioners are dependent on one or very few providers for the provision of NHS services.
944. A special administrator may, during a period of special administration, use financial assistance to cover operating costs associated with maintaining continuity of services. This might include the continuing costs of operating services, costs of restructuring the provider to ensure a sustainable future organisation or any indemnities for the administrator and other relevant persons for liabilities incurred, or loss or damage sustained in connection with the exercise of the administrator's powers and duties. Restructuring costs could include, but would not be limited to, renegotiation of service contracts, restructuring of debts, or payments made to a new operator to establish viable provision.

945. The financial mechanisms are not intended to provide long-term funding for organisations experiencing temporary liquidity issues, nor are they intended to provide long-term funding for services that are otherwise uneconomic to supply at national tariff because of market factors or special service requirements. The Government envisages that providers will secure capital from other sources (eg the Foundation Trust Financing Facility or other loans) to address temporary liquidity issues. In addition, the national tariff will include a process and methodology for increasing the prices payable to a provider, in individual cases, where necessary to sustain continuity of services required by commissioners that would otherwise be uneconomic to provide.

Establishment of mechanisms

Section 134 - Duty to establish mechanisms for providing financial assistance

946. This section places Monitor under a duty to establish effective financial mechanisms to support the operation of the special administration regimes provided for foundation trusts in Chapter 5A of Part 2 of the NHS Act and for companies in Chapter 5 of this Act.
947. Monitor has the power to determine the appropriate form of financial mechanisms (for example by levying contributions to a risk pool, establishing contingent liabilities or other approach that would best fit the risks) and whether and how the mechanisms may need to be varied for different providers. As specified by *subsection (2)*, these mechanisms could include, but need not be limited to:
- providers and commissioners being required to contribute to a collective insurance scheme or ‘risk pool’; or
 - providers being required to purchase their own insurance to cover such liabilities on failure as are specified by Monitor.
948. *Subsection (3)* provides that the mechanisms may make provision for Monitor to recover the costs of setting up and running those mechanisms.
949. The financial mechanisms are exempt from any provisions of the Financial Services and Markets Act 2000 and therefore not subject to Financial Services Authority regulation. The Government considers that Financial Services Authority regulation is not necessary given the statutory duties placed on Monitor and the better regulation safeguards set out elsewhere in this Act.
950. *Subsection (6)* provides that Monitor’s duty to establish a mechanism or mechanisms may be commenced before the rest of this Chapter. This is to allow the substantial development work to be undertaken so that the financing arrangements can be delivered in a timely manner.

Section 135 - Power to establish fund

951. *Subsection (1)* enables Monitor to establish and maintain a fund for the purposes of providing financial assistance to providers in special administration and gives Monitor flexibility to determine the appropriate mechanisms (eg a risk-pool operated by Monitor and funded by contributions from providers and, subject to regulations, commissioners).
952. *Subsections (3) to (8)* impose requirements on Monitor about the management of any such fund. Monitor is required to secure the prudential management of any such fund and to appoint at least two fund managers. These could be individuals or firms but Monitor must be satisfied:
- in the case of an individual, that the individual has the appropriate knowledge and experience for managing the investments and is not disqualified under the Financial Services and Markets Act 2000, and

- in the case of a firm, that arrangements are in place to ensure that any individual who exercises the firm's fund manager functions, at the time of doing so, has the appropriate knowledge and experience for managing the investments.

Applications for Financial Assistance

Section 136 - Applications

953. This section provides for the process by which a special administrator can make an application for financial assistance from Monitor.
954. *Subsection (2)* enables Monitor to specify the form of the application and the supporting evidence required. Monitor is required to either grant or refuse the application.
955. *Subsection (3)* requires that Monitor notifies a successful applicant of the purpose for which the financial assistance must be used, and the conditions attached, and *subsection (4)* requires that the special administrator may not use the assistance for any other purpose and must observe the conditions.
956. *Subsection (6)* obliges Monitor to notify an unsuccessful applicant of its reasons for refusing an application. If a special administrator requests a reconsideration of any refusal, Monitor must reconsider it and may request information from the applicant for that purpose. Any reconsideration must be carried out by individuals other than those who made the original decision to refuse the application (*subsection (7)*).
957. *Subsection (9)* provides that following reconsideration of an application, Monitor must notify the applicant of its decision and successful applicants must be notified of the purpose of the assistance and any conditions attached to it. Where the applicant is unsuccessful Monitor must give reasons for the refusal.
958. Financial assistance can be provided only during the period during which a provider was in special administration, however, it could be for a shorter time than the entire period (*subsection (5)*).

Section 137 – Grants and loans

959. This section prescribes the circumstances in which Monitor is able to give financial assistance in the form of loans or grants in response to an application from a special administrator. *Subsection (1)* provides that Monitor may only grant financial assistance if it is established that it is necessary to enable a provider to continue to provide some or all of the health care services that it provides for the purposes of the NHS or to secure a viable business to secure continued access to NHS services and that there is no other source of funding available.
960. *Subsection (3)* provides that Monitor would be able to grant financial assistance in whatever manner, and on whatever terms, it considered appropriate, subject to *subsection (2)*, which provides that those terms would have to include a term requiring the whole or a part of the grant to be repaid to Monitor if there were a contravention of the other terms.
961. *Subsections (4) and (5)* provide that Monitor is able to recover overpayments in the provision of grants and loans under this section. This includes a power to recover interest on the amount overpaid.

Charges on Commissioners

Section 138 – Power to impose charges on commissioners

962. This section gives the Secretary of State the power to make regulations that would allow Monitor to require commissioners to pay charges which relate to Monitor's functions to ensure continuity of NHS services.
963. *Subsections (2) and (3)* specify what must be included in the regulations, which includes provision about how the charge would be calculated, to whom it should be paid and when. The charge may be fixed in the regulations or determined by reference to criteria set in the regulations. Where a charge is set using criteria, the regulations must require Monitor to consult before imposing the charge. Where a charge is not paid when it is due, regulations must provide for interest to be payable on that amount and allow for any unpaid balance, including interest to be recoverable as a civil debt.
964. Where the charge is payable to a provider, Monitor may require the provider to pay Monitor that amount in accordance with the regulations.
965. *Subsection (5)* requires the Secretary of State to consult Monitor and the NHS Commissioning Board before making the regulations.
966. *Subsection (6)* states that regulations under this section may provide for consultation based on the consultation provisions in sections 141 and 142 and for calculation of amounts payable based on the provisions in section 143 in relation to charges imposed by commissioners.

Levy on providers

Section 139 – Imposition of levy

967. Under Section 135, Monitor has the power to impose levies on providers for the purposes of providing financial assistance during special administration (*subsection (1)*).
968. *Subsection (2)* requires that before the beginning of each financial year and before determining any levies to be imposed for that financial year, Monitor must estimate
- The funds needed to cover the potential costs of providing financial assistance during special administration in the forthcoming financial year;
 - The amount to be collected from commissioners in each financial year; and
 - Any surplus funds that would remain at the end of that financial year.
969. Where Monitor decides to impose a levy, *subsection (3)* requires Monitor to determine the methodology for establishing the rate of the levy and when the levy would be payable. An explanation of any changes to the methodology for establishing the rate must be included in the consultation required to be carried out under section 141 on any proposed levy. Monitor is able to differentiate the levies for different providers (*subsection (5)*).

Section 140 – Power of Secretary of State to set limit on levy and charges

970. This section enables the Secretary of State, by order and subject to the approval of HM Treasury, to limit the amount that Monitor may raise through any provider levies and charges on commissioners. The intention is that this power will be used only in exceptional circumstances, if the Secretary of State considers that the total amount that Monitor proposed to raise to support the special administration regimes was excessive. An order under this section is subject to the affirmative resolution procedure.

Section 141 - Consultation

971. This and subsequent sections set out the consultation requirements in relation to proposed provider levies and the processes by which they are to be calculated. Analogous provision in relation to commissioner charges may be made through regulations made under section 138(6).
972. This section requires Monitor to consult on the proposals for provider levies. The section specifies details about the consultation process, such as the people Monitor must notify and the length of the consultation period.

Section 142 – Responses to consultation

973. This section details how Monitor is required to handle objections to the proposals raised in response to the consultation. Monitor may not implement the proposals unless certain conditions set out in *subsection (2)* are met or, if the conditions are not met, Monitor has made a reference to the Competition Commission.
974. The conditions in subsection (2) are that the percentage of providers objecting to the proposals (the objection percentage) and, where regulations provide for this, the percentage of providers objecting to the proposals, weighted by their share of supply (the share of supply percentage) are both less than percentages prescribed by the Secretary of State in regulations. Those regulations may also provide for the method to be used in determining what is meant by “share of supply” in relation to a provider (*subsection (8)*).
975. If the conditions are not met and a reference to the Competition Commission is made, it must be made in terms that require the Commission to investigate and report on certain matters, specified in *subsection (4)*. Those matters are whether Monitor has failed to give sufficient weight to the matters to which it must have regard under section 66 in carrying out its functions and, if so, whether that failure does or might operate against the public interest and if it does, whether that could be remedied or prevented by changes to the proposals
976. **Schedule 10** applies to references made under this section, subject to the modifications set out in *subsection (5)*. The Schedule sets out the requirements and processes surrounding the reference to the Competition Commission and the Competition Commission’s determination of any reference. The Schedule also provides the process for modification of licence conditions following references to the Competition Commission – this is covered in these Notes above (after the notes on section 101).

Section 143 – Amount payable

977. *Subsection (1)* requires Monitor to calculate the amount each provider is to pay under the levy; and to notify the provider of that amount and when it will become payable for each financial year the levy is imposed. The amount payable may be pro-rated where the provider’s liability is only for part of the year (*subsection (2)*). It may also be zero (*subsection (3)*).
978. *Subsections (4) and (5)* enable Monitor to adjust the amount payable by a provider at any time, if Monitor judges that the risk of the provider going into special administration has changed since the start of the financial year or since it last adjusted the amount. Monitor may give notice of the proposed adjustment and where it does, it must specify the adjusted amount.
979. *Subsections (8) and (9)* require Monitor to recalculate the amount payable where a provider requests this, because the provider reasonably believes that the amount has been miscalculated. This provision only applies in relation to amounts payable during the current financial year, not past levies.

980. *Subsection (10)* specifies that Monitor can recover unpaid levies, including accrued interest, as a civil debt.

Supplementary

Section 144 – Investment principles and reviews

981. *Subsections (1) and (2)* relate to any investments Monitor wants to make for the purposes of providing financial assistance in special administration. A reason for Monitor making investments might be to manage the flows of money into and out of any fund it established to provide such assistance. It is likely that the flows out of a fund would be “lumpy”: in that instances where a provider was placed in special administration would be rare, but each would probably result in the drawing-down of significant proportions of the monies held in the fund. The Government anticipates that Monitor may want to take steps to smooth the impact of this “lumpiness” upon providers and commissioners.
982. *Subsection (1)* requires Monitor to prepare and publish a statement on the principles governing its decisions about investments for the purposes of providing financial assistance in special administration.
983. *Subsection (2)* provides that Monitor must review the statement annually, revising it if necessary. If Monitor revises the statement, it must re-publish it.
984. *Subsection (3)* requires Monitor to undertake and publish an annual review of the procedure for the operation of the trust special administration regime for foundation trusts and health special administration regime for companies and the financial mechanisms supporting them.
985. *Subsection (4)* specifies the purposes of such a review. Where the fund has been in operation in the year concerned, the review must specify the income and expenditure of the fund during the year. The published review must exclude commercially sensitive information and information about an individual’s private affairs, where disclosure would or might harm their interests (*subsection (6)*).

Section 145 - Borrowing

986. This section enables Monitor to take out loans in order to exercise its functions to provide financial assistance. This is intended to give Monitor greater flexibility in the ways it manages the flows of money into and out of any funds it holds. The nature of failure is not entirely predictable, therefore the instances of failure could be zero for a considerable time period and then there could, in theory, be several occurring all at a similar time. In an instance like this, the funds may be tied up in investments to make the most of public money. Borrowing may be a suitable alternative to releasing money at short notice from investments (which may involve penalties).
987. *Subsection (2)* provides that Monitor would not be able to borrow beyond a borrowing limit specified by the Secretary of State by order.

Section 146 - Shortfall or excess of available funds, etc.

988. *Subsection (1)* enables the Secretary of State to provide financial assistance to Monitor, if the Secretary of State is satisfied that the financial mechanism established by Monitor to provide funds to special administrators is not generating sufficient funds or the mechanism is not operating effectively. This means that the Secretary of State could top up the financial mechanisms to ensure the continuity of NHS services, where necessary.
989. *Subsections (2) and (3)* provide that the Secretary of State can direct Monitor to transfer funds to the Secretary of State if satisfied that the funds generated by a financial mechanism exceed the level necessary or if the financial mechanism is dormant or

has been wound up. This provision is to ensure excess funds do not go unused. The Secretary of State could use the funds for re-investment in the health service.

Chapter 7 – Miscellaneous and general

Section 147 – Secretary of State’s duty as respects variation in provision of health services

990. This section inserts new section 12E into the NHS Act. This is intended to ensure that the Secretary of State does not, in exercising the functions specified in subsection (2), deliberately favour any particular sector, such as the public, private or voluntary sector. Specifically, the new section prohibits the Secretary of State from seeking to increase or decrease the proportion of NHS healthcare services that are delivered by a particular description of providers. The Act provides for similar duties on Monitor under section 62(10) and the NHS Commissioning Board under section 23.

Section 148 - Service of documents

991. Details are provided in this section of how notices required under this Part should be sent, including details of when a notice is to be treated as having been delivered.

Section 149 - Electronic communications

992. This section provides that Monitor may send notices in electronic form, if the person to be notified has given permission to receive notices electronically and has provided an email address. Monitor may impose requirements about how notices are to be sent to it or the Competition Commission electronically; and it must publish whatever requirements it imposes.

Section 150 - Interpretation and consequential amendments

993. This section provides definitions for the purposes of this Part, and gives effect to Schedule 13.

Schedule 13 – Part 3: minor and consequential amendments

994. **Schedule 13** contains minor and consequential amendments, most of which reflect the change of Monitor’s statutory name.