

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – NHS foundation trusts and NHS trusts

Governance and management

Section 151 – Governors

995. This section makes changes to the powers of foundation trust governors as specified in Schedule 7 to the NHS Act and makes provision about their collective duties. It is intended to strengthen foundation trusts' internal governance given that the Act reduces specific oversight of foundation trusts by Monitor, with future controls operating through regulatory licensing and clinically-led NHS commissioning of all providers.
996. *Subsection (1)* formally renames the board of governors the “council of governors” in order to avoid confusion between it and the board of directors and to reflect practice.
997. The Act retains minimum requirements on the composition of the council of governors, including the existing requirement for there to be a majority of elected governors. *Subsection (2)* removes the existing requirement for the council of governors to include a member appointed by a Primary Care Trust, reflecting the abolition of Primary Care Trusts elsewhere in the Act. *Subsection (3)* provides that a foundation trust can specify in its constitution any other organisation that is entitled to appoint a member or members of the council of governors. This would enable foundation trusts to tailor their governance to local circumstances.
998. *Subsection (4)* sets out the duties of the council of governors, making explicit the duties on governors that are implicit in the NHS Act through their election by members and existing powers over non-executive directors. *Subsection (5)* provides that foundation trusts will be required to take steps to ensure that governors are equipped with the skills and knowledge they require. *Subsection (6)* gives governors an additional power to hold directors of the trust to account by enabling them to require directors to attend a meeting for the purposes of obtaining information about the performance of the trust or its directors, and to vote on issues concerning their performance. The trust is required to include any such meetings in its annual report (*subsection (8)*).
999. *Subsection (7)* amends paragraph 23(4)(c) of Schedule 7 to the NHS Act to enable the Secretary of State to decide who is eligible for appointment as auditor by a foundation trust's governors. This section moves a power currently held by Monitor to the Secretary of State. This is in line with the changes to accounting requirements described below in the Accounts sections. This power supplements paragraph 23(4)(a), which stipulates that a person may be appointed as an auditor if he is a member of one of the bodies mentioned in section 3(7)(a) to (e) of the Audit Commission Act 1998.

Section 152 – Directors

1000. This section specifies some of the duties on directors of foundation trusts. *Subsection (1)*, by amending Schedule 7 to the NHS Act, places a general duty on the directors to promote the success of the trust.
1001. *Subsections (2) and (3)* set out the specific ways in which duties to avoid conflicts of interest, to declare any interest in a proposed transaction and not to accept benefits from third parties apply in relation to foundation trust directors. By virtue of their office in public sector organisations, directors are subject to certain duties that reflect administrative law principles. These are similar to specific duties on directors of other organisations, such as those on company directors which are set out in the Companies Act 2006. These general duties include, among others, a duty to act within their legal powers, a duty only to exercise their powers for the purposes of which they are conferred, a duty to exercise reasonable care, skill and diligence; and a duty to act in accordance with the constitution of the organisation. However, in relation to conflicts of interest and accepting benefits, the Act specifies the ways in which these duties apply to foundation trust directors. This creates certain exceptions to administrative law principles, for example by permitting a conflict of interest if sanctioned in accordance with the trust’s constitution.
1002. To ensure that governors of foundation trusts have the information they require to discharge their duties, *subsection (4)* requires directors to send their governors agendas for, and minutes of, their meetings. *Subsection (5)* requires the foundation trust’s constitution to provide for meetings of the board of directors to be held in public, so that governors and through them members and the public may better scrutinise the board’s decisions. Provision is also made here for the board of directors to have a closed part of the meeting for specific reasons (for example, to discuss confidential and sensitive matters).

Section 153 – Members

1003. This section requires a foundation trust to take steps to ensure that the membership of any public and patient constituencies is representative of those eligible to be members. Under sections elsewhere in the Act, Monitor will lose the power to ensure this through terms of authorisation. Paragraph 3(1)(a) of Schedule 7 to the NHS Act defines a public constituency as comprising “individuals who live in any area specified in the constitution as the area for a public constituency” while paragraph 3(1)(c) of that Schedule provides that the patient constituency includes “individuals who have attended any of the corporation’s hospitals either as a patient or the carer of a patient within a period specified in the constitution”. Having specific patient constituencies for members is optional for foundation trusts.
1004. *Subsection (2)* requires a foundation trust to have regard to the population it serves in deciding on the geographic areas eligible for its public constituency and any patient constituency. For example, if a foundation trust serves patients from a wide area – if for instance it is a regional centre of expertise or a tertiary referral centre – the effect would be to require the trust to give consideration to creating a separate patient constituency if it decided against including the whole area in its public constituency.

Section 154 – Accounts: initial arrangements

1005. This section, and the following section on variations to initial arrangements for accounts, make changes to the accounting requirements of foundation trusts. These sections amend provisions in Schedule 7 to the NHS Act and specify Monitor’s responsibilities in relation to the production of foundation trust accounts. They reflect changes to government accounting rules, allow the Secretary of State to fulfil his functions and remove an aspect of Monitor’s role which was specific to foundation trusts and is not therefore appropriate to its role as health sector regulator.

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

1006. This section specifies the initial arrangements for foundation trust accounts, amending the existing provisions in paragraphs 24 and 25 of Schedule 7 to the NHS Act under which Monitor has powers to direct foundation trusts on form, content and other matters relating to foundation trust accounts.
1007. The section requires Monitor to seek the approval of the Secretary of State, rather than of HM Treasury, on foundation trust accounting matters. This enables the Secretary of State to ensure that the accounting directions issued by Monitor are in line with the accounting framework that the Department of Health must follow in preparing its accounts, set out by HM Treasury in their Financial Reporting and Accounting Manual.
1008. During the financial year 2011/12 foundation trusts moved within the Department's accounting boundary under the cross-Government "clear line of sight" initiative. The effect of this is that foundation trusts are fully consolidated into the Department's resource account. Therefore, foundation trust accounts will, need to be produced to the same standards and timescales as those of the Department and other organisations in the Department's "group". As the Department must produce its accounts in accordance with HM Treasury guidance, subject to any agreed divergence, foundation trust accounts must be consistent with HM Treasury accounting guidance.

Section 155 – Accounts: variations to initial arrangements

1009. This section provides that after a transitional period, the powers and duties relating to the production of foundation trust accounts will transfer from Monitor to the Secretary of State. It will not be appropriate for Monitor as the sector regulator to have an ongoing and specific role in foundation trust accounts when this will not be the case for other providers.
1010. This section will, once commenced, bring the interim accounting arrangements to an end, as stated in *subsection (7)*.
1011. This section amends paragraphs 24 and 25 of Schedule 7 to the NHS Act (as amended by the previous section) to substitute the Secretary of State for Monitor in respect of those powers and duties relating to the form, content, timing and other matters concerning the accounts of foundation trusts. The section requires the Secretary of State to seek the approval of HM Treasury on foundation trust accounting matters.

Section 156 – Annual report and forward plan

1012. This section specifies new requirements relating to Monitor's existing power to determine the content of foundation trusts' annual reports and provides for the transfer of powers relating to annual reports and forward plans to the Secretary of State.
1013. *Subsection (1)* requires foundation trusts to include in their annual reports information on the pay and remuneration of directors and expenses of governors and directors. This is in line with the requirements on other public sector organisations and those already set out in Monitor's current code of governance. *Subsection (2)* requires Monitor to consult before imposing significant new requirements regarding the contents of annual reports.
1014. *Subsection (3)* provides that in future the power to determine the content of foundation trusts' annual reports could move from Monitor to the Secretary of State. He would need to set out such requirements in secondary legislation, mirroring the existing requirements on charities. The timing of this change would be for the Secretary of State to decide, but it is anticipated that this would be at a time at which the requirements on the content of foundation trust annual reports had stabilised.
1015. *Subsection (4)* places a duty on foundation trusts to send their forward plans to the Secretary of State, rather than to Monitor as previously. Alongside provisions on accounts, this is to ensure the Department of Health has the information it needs to manage its financial obligations, since the spending of foundation trusts counts towards the Department's spending. The effect of *subsection (5)* is that foundation trusts'

forward plans will no longer be included on the register of foundation trusts. The public retain the right to request, free of charge, a copy of the latest information as to the forward planning of a trust from the organisation concerned, as under paragraph 22(1)(e) of Schedule 7 to the NHS Act.

Section 157 – Meetings

1016. This section requires foundation trusts to hold an annual meeting of the trust's membership. This meeting must be open to members of the public. *Subsection (1)* inserts a new paragraph 27A into Schedule 7, and gives the membership of a foundation trust a role in relation to considering the organisation's annual report and accounts. This is intended to secure the accountability of governors and directors to the members and to promote transparency about the trust's performance.
1017. *Subsection (1)* also provides that the membership of the trust, at the annual meeting, must be able to vote on constitutional amendments affecting the role of governors, similar to the scrutiny of other changes by governors.
1018. *Subsection (2)* clarifies that the existing requirement on the council of governors to hold a general meeting to consider the trust's annual accounts and report in no way prevents the governors holding a general meeting more than once a year if they wish to do so. *Subsection (3)*, inserting a new paragraph 28A, enables the trust, if it wishes, to combine the annual meeting held by the membership with a general meeting of the council of governors.

Section 158 – Voting

1019. This section inserts a new paragraph 30 into Schedule 7 to the NHS Act. This gives the Secretary of State, in light of new decision-making powers for foundation trusts in subsequent sections, a regulation-making power subject to the affirmative procedure to alter the associated voting arrangements for directors, governors and members of foundation trusts provided for in this Act. This is to ensure that new voting arrangements for foundation trusts could, if necessary, be modified in light of how they work in practice.
1020. Existing voting provisions unaffected by this Act, such as the majority of governors required to remove a non-executive director, are beyond the scope of this power. In general, beyond provisions on the appointment of non-executive directors by governors, specific voting arrangements for foundation trusts have not been provided for in detail in primary legislation and this section is intended to ensure that the new voting provisions can be modified if necessary. Under this section, the Secretary of State could, for example, change the size of a majority required for approving mergers or for making changes to the constitution of a foundation trust, or specify that such a majority should be of those eligible to vote as opposed to those actually voting.
1021. *Subsection (2)* provides that any regulations made under this section would be subject to the affirmative resolution procedure.