

## **Ultimate controller undertaking: template and guidance (Continuity of Services Condition 4)**

**Note: this does not apply to  
NHS foundation trusts**

## **About Monitor**

Monitor is the sector regulator for health services in England. Our job is to protect and promote the interests of patients by ensuring that the whole sector works for their benefit.

For example, we make sure foundation trust hospitals, ambulance trusts and mental health and community care organisations are well led and are run efficiently, so they can continue delivering good quality services for patients in the future. To do this, we work particularly closely with the Care Quality Commission, the quality and safety regulator. When it establishes that a foundation trust is failing to provide good quality care, we take remedial action to ensure the problem is fixed.

We also set prices for NHS-funded services, tackle anti-competitive practices that are against the interests of patients, help commissioners ensure essential local services continue if providers get into serious difficulty, and enable better integration of care so services are less fragmented and easier to access.

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# 1. Introduction

## Background

NHS foundation trusts have been licensed since April 2013. Other eligible providers will receive licences from 1 April 2014. This NHS [provider licence](#) is one of Monitor's key tools for protecting and promoting the interests of patients by ensuring that the health sector works for their benefit. It sets out a range of conditions that providers must meet.

'Commissioner requested services' (CRS) are services that commissioners consider need protecting in the event of provider failure. Providers of CRS are therefore subject to an additional set of licence conditions – the Continuity of Services conditions – which include the obligation to continue providing the services in question, and not to make material changes to the way in which they are provided without the agreement of commissioners.

A core part of our role is to help commissioners to ensure that, in the rare event that a healthcare provider fails, patients can continue to access the care they need.

As a licensed provider of CRS, your organisation may be controlled by another, such as a parent company. If this is the case, you are required to put in place a legally enforceable undertaking with each of your controlling organisations or companies – your 'ultimate controllers' – to protect your CRS services.

### Who is an ultimate controller?

An ultimate controller is any body which can, either alone or jointly with others, instruct a licensed provider (the licensee) to act in a certain way, but which cannot itself be instructed to act in a certain way. An ultimate controller can be a natural person or a body corporate. Certain types of bodies, such as charity trustees, are specifically excluded from the definition of ultimate controller. In practice, the ultimate controller would usually be the parent company of a subsidiary company which has been licensed by Monitor, provided that the parent company was not itself a subsidiary.

If there is no body that could instruct you as a licensed provider in this way, then you do not have an ultimate controller and do not need an undertaking under this condition. **Please note that NHS foundation trusts do not have ultimate controllers.**

If you have more than one ultimate controller, then you must secure an undertaking with each of them.

Please refer to [Continuity of Services Condition 4](#) of the licence for a full definition of an ultimate controller.

## **What is an ultimate controller undertaking?**

An 'ultimate controller undertaking' is a regulatory tool used to ensure that parent companies do not take action that would cause a licensee to breach its licence (in this case, your Monitor licence) or contravene any requirements of the Health and Social Care Act 2012. The undertaking also requires ultimate controllers to provide you with the information that you need to share with Monitor.

Similar licence conditions operate in the regulated parts of the gas, electricity, rail and water sectors.

## **Why do we need an ultimate controller undertaking?**

The undertaking is an important part of the regulatory regime that protects the continuity of services to patients. It is designed to support your ability to provide CRS. For example, in giving the undertaking, an ultimate controller promises not to restructure the licensee, sell its assets or adjust the terms of intra-group arrangements in a way that would affect the licensee's ability to deliver its CRS.

## 2. How do I complete the undertaking?

You must complete the attached template (Annex 1) to provide your ultimate controller undertaking. Please note that this template cannot be amended in any way.

Undertakings must remain in place for as long as the relationship between the provider and their ultimate controller(s) exists.

### Timing

You are required to obtain undertakings within **7 days** of becoming licensed and designated as a CRS provider or becoming subject to a new ultimate controller.

### Submission to Monitor

You have a further **7 days** to provide Monitor with a copy of your signed undertaking. This should be submitted through the secure portal.

### Enforcement

As a licensee, you are required to make sure that you have a legally enforceable ultimate controller undertaking from your ultimate controller(s). You are also required to fulfil any request by Monitor to enforce the undertaking.

If you **do not** obtain an ultimate controller undertaking and submit it within the set timelines, you will be in breach of your licence. Our ['Enforcement Guidance'](#) describes how we will respond to breaches.

### Further information

If you have any queries about the ultimate controller undertaking, please contact the Independent Provider Licensing Team at Monitor: [licensing@monitor.gov.uk](mailto:licensing@monitor.gov.uk)



## **UNDERTAKINGS**

The Covenantor hereby undertakes in favour of the Licensee that it will:

1. refrain from any action, and will procure that any person which is a subsidiary of, or which is controlled by, the Covenantor (other than the Licensee and its subsidiaries) will refrain from any action, which would be likely to cause the Licensee to be in contravention of any of its obligations under the Health and Social Care Act 2012 or its NHS Provider Licence
2. give to the Licensee, and will procure that any person which is a subsidiary of, or which is controlled by, the Covenantor (other than the Licensee and its subsidiaries) will give to the Licensee, all such information in its possession or control as may be necessary to enable the Licensee to comply fully with its obligations under its NHS Provider Licence to provide information to Monitor.

## **DURATION**

The Undertakings shall take effect on the date that this Deed is made and shall continue in full force and effect until the Deed automatically expires upon the date that:

- (i) the Covenantor ceases to be an Ultimate Controller;
- (ii) the Licensee no longer provides any services as Commissioner Requested Services; or
- (iii) the Licensee no longer holds or is required to hold an NHS Provider Licence

whichever is the earlier.

## **GENERAL**

This Deed is governed by and shall be construed in accordance with English law. The parties agree that the courts of England shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Deed or its subject matter or formation.

Neither party shall be entitled to assign or otherwise transfer this Deed or any part of it.

A person who is not a party to this Deed shall not have any rights under or in connection with it pursuant to the Contracts (Rights of Third Parties) Act 1999.

**IN WITNESS** of which, this Deed has been executed and delivered on the date first appearing.



**EXECUTED AS A DEED BY**

[DN: Covenantor and Licensee to insert appropriate signature block eg]

The Common Seal of

[Name of Ultimate Controller]

Was hereunto affixed in the presence of

\_\_\_\_\_ Authorised signatory

[or]

[Name of Ultimate Controller]

Acting by two directors or a director and the company secretary

\_\_\_\_\_ Director

\_\_\_\_\_ Director/Company Secretary

And

**EXECUTED AS A DEED BY**

The Common Seal of

[Name of Licensee]

Was hereunto affixed in the presence of

\_\_\_\_\_ Authorised signatory

[or]

[Name of Licensee]

Acting by two directors or a director and the company secretary

\_\_\_\_\_ Director

\_\_\_\_\_ Director/Company Secretary



Making the health sector  
work for patients

## Contact us

Monitor, Wellington House,  
133-155 Waterloo Road,  
London, SE1 8UG

Telephone: 020 3747 0000  
Email: [enquiries@monitor.gov.uk](mailto:enquiries@monitor.gov.uk)  
Website: [www.monitor.gov.uk](http://www.monitor.gov.uk)

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