

**The asset register
and disposal of
assets:
guidance for
providers of
commissioner
requested services**



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 April 2014. The [provider licence](#) is our key tool for carrying out the majority of our functions. It sets out a range of conditions that providers must meet.

A core part of Monitor's role is to support commissioners to ensure that, in the rare event of the failure of a healthcare provider, patients can continue to access the care they need.

'Commissioner requested services' (CRS) are services, which are formally designated by commissioners as such and which would be considered hard to replace should a provider fail financially. For example, services might be CRS if there are no alternative providers in the locality. 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. Together, the set of conditions is designed to allow early intervention by Monitor in the event that we have concerns about a provider's ability to continue to provide CRS. We will step in under these conditions when there are warning signs that a licensee is struggling financially, with the aim of encouraging it to return to financial sustainability.

Continuity of Services Condition 2 concerns the disposal of CRS assets. The full text of the condition is set out in the annex to this document. The condition first places an obligation on licensees to establish, maintain and keep up to date, an asset register which lists every relevant asset¹ used by the licensee in the provision of CRS.

The condition then establishes a safety net for exceptional circumstances where the disposal² of such assets could pose a significant risk to the continued provision of CRS for patients. In the event that we find a licensee to be at risk of no longer remaining a going concern, restrictions are placed on them to prevent the disposal of relevant assets without our prior written consent.

We are keen to ensure that our oversight of CRS assets does not create an undue regulatory burden on providers that might hamper innovation or discourage improvements in the way services are provided. Therefore, when a provider is operating normally, it is free to dispose of such assets without Monitor's involvement. In this way, we have sought to minimise the burden that this condition places on licensees by setting up a process that is largely self-regulating and risk-based.

¹ See p.7 for the definition of a 'relevant asset'.

² See p.14 for the full definition of 'disposal'.

The purpose of this guidance

The purpose of this guidance is two-fold.

First, it provides guidance on what comprise 'relevant assets' and on the principles in establishing and maintaining the register of relevant assets. As licensees develop their experience of constructing the register, we may update this guidance with best practice examples.

Second, the document outlines Monitor's approach to disposals of CRS assets when a provider has been notified that it is at risk of not being a going concern:

Who is this guidance for?

This guidance is intended to be used by all NHS foundation trusts and independent sector providers of healthcare who both (a) hold a provider licence **and** (b) provide CRS.

It is likely that this guidance will be most useful for those departments that have responsibility within providers for maintaining the asset registers. For example, this may be the finance department or the estates department.

Acknowledgments

In drafting this guidance, we have been assisted by a number of organisations who have helped us to understand the impact it will have on their organisations and the key issues that will arise for them.

2. The asset register obligations

On receiving a provider licence, licensees who deliver services designated as commissioner requested services (CRS) are required to maintain an asset register and this must list all the relevant assets used in the provision of CRS.

Relevant assets are 'any items of property, including buildings, interests in land, equipment (including rights, licenses and consents relating to its use), without which the licensee's ability to meet its obligations to provide CRS would reasonably be regarded as materially prejudiced'. While this register may contain many assets which are already listed in the provider's other asset registers, the provider licence requires licensees to:

- first, identify which of their services are designated as CRS and
- second, identify which assets used in the provision of these services are considered relevant.

Section 3 of this document sets out our guidance on relevant assets and on the asset register. Condition of Service (CoS) 2(10) of the provider licence requires licensees to have regard to this section of the guidance.

Once the asset register is established, the licensee must keep it up to date in an adequate and professional manner. It is not intended that the register should be a public document so the licensee can apply appropriate measures to ensure its confidentiality.

In the event that we have notified a licensee that we are concerned about its ability to remain a going concern, Monitor will request an up-to-date copy of the asset register and may test its completeness and accuracy. Section 5 of this guidance sets out Monitor's approach in more detail.

3. What assets and information should be included in the register?

a. What is considered a relevant asset?

A relevant asset is any item of property including buildings, land or equipment, without which a licensee's ability to provide commissioner requested services would be regarded as materially prejudiced. The full definition is contained in the Annex. Intellectual property rights and data could also be relevant assets. We consider that 'materially prejudiced' means substantially harmed or impaired. As a general guide, we would not expect that the loss of an asset with a replacement value equal to or below £5,000 or the licensee's capitalisation threshold (whichever is the lower), referred to as the 'de minimis', would substantially harm or impair the delivery of CRS.

b. What is **not** considered a relevant asset?

We would not expect the register to include items which could be replaced quickly and easily, such as clinical consumables or office furniture, as their disposal should not materially impact on the provision of CRS. As an indication, Monitor would not expect an item to be listed if its replacement value was below the 'de minimis'. If licensees choose to apply a different materiality threshold, we would expect a reasonable justification for doing so.

c. Do I need to agree the contents of the asset register with Monitor or commissioners?

You are not required to consult us or commissioners when developing the asset register. We would however consider it best practice for providers to engage with commissioners to ensure the assets included on the register meet their expectations (those required to deliver the services designated as CRS).

d. Do I need to list every property and every single piece of equipment within my organisation?

No – if an asset is not used in any way to deliver CRS, it should not be listed as a relevant asset. We do not expect licensees to list every item of equipment within their organisation – especially if the item could be quickly or easily replaced (such as clinical consumables). As a general rule, items with a replacement value equal to or above the 'de minimis' should normally be included, unless their exclusion would not materially prejudice the provision of CRS.

e. Do I need to list value, age and condition of assets?

These details are not required by the licence, although the licensee can record such information within the register if it wishes to. The register must be adequately and professionally maintained, so we would expect to see basic details like the addresses of buildings, patent numbers or other asset identifiers.

- f. Should I list an asset on the register if it is used for both CRS and non-CRS services?

If an asset is used in the provision of CRS and meets the definition of 'relevant asset', it should be listed. This includes assets that are also used in the provision of non-CRS services. We call these 'mixed use assets'.

- g. What if an asset is used for non-medical purposes?

If an asset is not used in any way to deliver CRS, it should not be listed as a relevant asset. However if a licensee's ability to provide at least one CRS would be materially prejudiced by the disposal of the asset in question, then it should be included on the asset register.

- h. What if an asset used in the provision of CRS is not owned by the licensee?

Assets that are not owned by the licensee, but are relevant assets for the purposes of CRS must be listed on the asset register; for example, assets held under lease arrangements, contractual licences or informal arrangements for access.

We accept that in this situation licensees will not have complete control over non-owned assets used to deliver CRS, but they should consider how they have secured continuity of access to such assets. This includes when making their annual availability of resources statements (as required under CoS Licence Condition 7).

- i. Should I list cash as a relevant asset?

No.

- j. Is a sub-contract for services a relevant asset?

A sub-contract should not be considered a relevant asset for the purpose of the asset register. Licensees should however list relevant subcontractors (that is, those involved in the delivery of CRS) as part of their annual declaration for CoS Licence Condition 7, the availability of resources statement.

4. Monitor's approval process for asset disposals

Where licensees are operating normally (that is, are not judged by Monitor to be at risk of financial failure), they are **not** required to seek our approval for the disposal of any relevant assets. Their only obligations are to ensure that their asset registers are established and appropriately maintained. Other safeguards exist to ensure CRS delivery during normal circumstances, including CoS Licence Conditions 1 and 7 of the provider licence (which require licensees to seek commissioner approval to changes in the manner in which CRS are delivered and to self-certify annually that all the required resources are available to ensure continued provision of CRS, respectively).

Disposals of CRS assets when a provider is at risk of financial failure

In the event that we judge a licensee to be at risk of no longer remaining a going concern, the licensee is then considered to be at risk of financial failure and is required to seek our approval prior to disposal of any relevant assets. We will at this stage ask for an up-to-date copy of the register of relevant assets. The register should be a complete record of all the relevant assets, but, in the event that the classification of an asset as a relevant asset or not is in dispute, we will apply the procedure set out in Section 5.

If a licensee is required to seek Monitor's approval for the disposal of a relevant asset, it must first obtain written consent from all commissioners which have designated the related service(s) as CRS. The commissioner's written consent should then be provided to Monitor. We will aim to respond in writing within 10 working days. In exceptional circumstances there may be issues which result in Monitor taking longer than 10 days to respond, but we expect these to be rare. In many cases we are likely to approve the disposal if the commissioners have provided their written consent.

Monitor approval is **not** required for like-for-like replacements. The same would also apply where an asset is to be replaced for an upgraded or newer version, where the ability to maintain provision of the CRS, as agreed with commissioners, remains intact. This is a general consent for the purpose of CoS Licence Condition 2.

If the Care Quality Commission (CQC) requires disposal of a relevant asset, for example on safety grounds, the licensee must notify Monitor of the occurrence but does not need to seek our approval. Under such circumstances, we will work with CQC, commissioners and the licensee to ensure continuity of service risk is appropriately managed.

Where any relevant commissioners have not consented to a disposal, we may nevertheless approve it if:

- a. it can be clearly demonstrated that the asset is no longer required to provide CRS: examples include (i) the redundancy of a surplus asset as a result of either a change in the provision of CRS (for example, through service reconfiguration) or an addition of a new asset which renders the classification of the disputed asset no longer relevant (ii) the replacement/upgrade of asset within the context of a wider

refurbishment effort (or of securing better leasing terms) or (iii) de-designation of the underlying CRS

- b. we are satisfied that there is urgent need to proceed with the disposal (eg as part of a broader re-financing package for a capital programme) and that alternative arrangements for the provision of the CRS can be demonstrated
- c. in the case of mixed use assets, we are satisfied that the CRS designated part of its usage is sufficiently separate from the non-CRS designated part such that the non-CRS part can be disposed without any adverse effect on the provision of CRS.

Monitor is likely to reject a proposed disposal if the loss of the asset poses a significant risk to continued provision of CRS by the provider (or by any incoming trust special administrator in the case of NHS foundation trusts).

Once we have considered a licensee's disposal request, we will take one of the following actions:

- a. approve the disposal unconditionally
- b. approve any proposed disposal with conditions (for example, to ensure proceeds of any disposal are used for a particular purpose)
- c. reject the proposed disposal
- d. reject the proposed disposal and recommend modifications to all or specific parts of the licensee's disposal plan (eg to take account of relevant commissioners and/or Monitor requirements) upon which the proposal could be accepted in the future.

Where Monitor has rejected a proposed disposal, this will be noted against the provider's profile on the register of licence holders.

5. Disputing the classification of assets

If we judge a licensee to be at risk of no longer remaining a going concern, Monitor will request a copy of the licensee's asset register. We will then seek the relevant commissioner's views as to the accuracy and completeness of the register. (Please note: licensees are required under General Condition 1 of the licence to ensure information provided is accurate, complete and not misleading.)

The register should be a complete record of all the relevant assets. However, if commissioners consider that the register has omitted certain assets, ie the register is understated, and this is accepted by the licensee, we will require the licensee to make immediate corrections and resubmit its updated register to us.

Should the licensee dispute the classification of a particular asset(s) as relevant, Monitor will undertake the following steps to determine the appropriate classification:

1. We will require the licensee to demonstrate that the disputed asset is not or is no longer used to provide CRS.
2. If the asset is a mixed use asset, we will ask the licensee to demonstrate that the element not classified as relevant is sufficiently separable from the CRS therefore enabling this element to be removed from the register.

In both cases this would allow potential disposal without Monitor approval.

We will decide at the time a dispute arises whether it will be resolved by (a) Monitor conducting the whole process, including any investigation, and making the determination; or (b) delegating the investigation (or a specific part of it) to a third party, with Monitor taking the final decision. The rationale for this approach is that it provides flexibility for us to make use of third party expertise (for example, on local service needs) while retaining the final decision on a key policy area affecting licensees.

We will aim to issue our decision on such classification disputes normally within 28 days of the dispute arising. This may however take longer where requests for information from the licensee or relevant commissioners result in delay. There may also be issues which result in Monitor taking longer than 28 days to respond, but we expect these to be rare. Monitor's decision is final and there is no right of appeal.

6. Reporting and disclosure requirements

The following disclosure requirement applies to NHS foundation trusts only. This requirement, concerning profit and losses on disposal of land and buildings, is detailed in the 'NHS Foundation Trust Annual Reporting Manual', and comes under Monitor's powers to issue direction to foundation trusts covering the form and content for their accounts.

Where land and buildings assets used in the provision of CRS have been disposed of during the year, a narrative disclosure is required. This should include:

- the net book value of the asset
- the amount of any sale proceeds or other consideration receivable
- an explanation of the means by which the NHS foundation trust will continue to meet its obligations to provide CRS. This might include details of replacement assets, use of under-utilised existing assets, or leasing arrangements.

Where an NHS foundation trust has been placed in Trust Special Administration, substitute 'commissioner requested' with 'location specific'.

Note that this disclosure requirement for NHS foundation trusts only applies to **land and buildings**. This is to preserve similar accountability in reporting as was required under the former protected assets regime.

Annex: The asset register condition

The asset register licence condition is drafted to allow a clear interpretation of the requirements it places upon providers. The condition reads:

Condition CoS2 – Restriction on the disposal of assets

1. The Licensee shall establish, maintain and keep up to date, an asset register which complies with paragraphs 2 and 3 of this Condition ('the Asset Register')
2. The Asset Register shall list every relevant asset used by the Licensee for the provision of Commissioner Requested Services.
3. The Asset Register shall be established, maintained and kept up to date in a manner that reasonably would be regarded as both adequate and professional.
4. The obligations in paragraphs 5 to 8 shall apply to the licensee if Monitor has given notice in writing to the Licensee that it is concerned about the ability of the licensee to carry on as a going concern.
5. The Licensee shall not dispose of, or relinquish control over, any relevant asset except:
 - (a) with the consent in writing of Monitor, and
 - (b) in accordance with the paragraphs 6 to 8 of this Condition.
6. The Licensee shall furnish Monitor with such information as Monitor may request relating to any proposal by the Licensee to dispose of, or relinquish control over, any relevant asset.
7. Where consent by Monitor for the purpose of paragraph 5(a) is subject to conditions, the Licensee shall comply with those conditions.
8. Paragraph 5(a) of this Condition shall not prevent the Licensee from disposing of, or relinquishing control over, any relevant asset where:
 - (a) Monitor has issued a general consent for the purposes of this Condition (whether or not subject to conditions) in relation to:
 - (i) transactions of a specified description; or
 - (ii) the disposal of or relinquishment of control over relevant assets of a specified description, andthe transaction or the relevant assets are of a description to which the consent applies and the disposal, or relinquishment of control, is in accordance with any conditions to which the consent is subject; or

- (b) the Licensee is required by the Care Quality Commission to dispose of a relevant asset.

9. In this Condition:

'disposal'	<p>means any of the following:</p> <p>(a) a transfer, whether legal or equitable, of the whole or any part of an asset (whether or not for value) to a person other than the Licensee; or</p> <p>(b) a grant, whether legal or equitable, of a lease, licence, or loan of (or the grant of any other right of possession in relation to) that asset; or</p> <p>(c) the grant, whether legal or equitable, of any mortgage, charge, or other form of security over that asset; or</p> <p>(d) if the asset is an interest in land, any transaction or event that is capable under any enactment or rule of law of affecting the title to a registered interest in that land, on the assumption that the title is registered,</p> <p>and references to 'dispose' are to be read accordingly;</p>
'relevant asset'	<p>means any item of property, including buildings, interests in land, equipment (including rights, licenses and consents relating to its use), without which the Licensee's ability to meet its obligation to provide Commissioner Requested Services would reasonably be regarded as materially prejudiced;</p>
'relinquishment of control'	<p>includes entering into any agreement or arrangement under which control of the asset is not, or ceases to be, under the sole management of the Licensee, and 'relinquish' and related expressions are to be read accordingly.</p>

10. The Licensee shall have regard to such guidance as may be issued from time to time by Monitor regarding:

- (a) the manner in which asset registers should be established, maintained and updated, and
- (b) property, including buildings, interests in land, intellectual property rights and equipment, without which a licence holder's ability to provide Commissioner Requested Services should be regarded as materially prejudiced.



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