

# Monitor

Making the health sector  
work for patients

## Risk assessment framework

Updated August  
2015



## About Monitor

As the sector regulator for health services in England, our job is to make the health sector work better for patients. As well as making sure that independent NHS foundation trusts are well led so that they can deliver quality care on a sustainable basis, we make sure: essential services are maintained if a provider gets into serious difficulties; the NHS payment system promotes quality and efficiency; and patients do not lose out through restrictions on their rights to make choices, through poor purchasing on their behalf, or through inappropriate anti-competitive behaviour by providers or commissioners.

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## Summary

Since 1 April 2013 all NHS foundation trusts have needed a licence from Monitor stipulating the specific conditions they must meet to operate, including financial sustainability and governance requirements. This document sets out the risk assessment framework we use to assess each NHS foundation trust's compliance with two specific aspects of its provider licence: the continuity of services and governance licence conditions.

Monitor's assessment of a foundation trust under the risk assessment framework aims to identify:

- significant risk to the financial sustainability of a provider of key NHS services that endangers the continuity of those services and/or
- poor governance at an NHS foundation trust, including poor financial governance and inefficiency.

NHS foundation trusts are assigned a financial sustainability risk rating calculated using a capital service metric, liquidity metric, income and expenditure (I&E) margin metric and variance from plan metric.

A foundation trust's governance rating is determined using information from a range of sources including national outcome and access measures, outcomes of Care Quality Commission (CQC) inspections and aspects related to financial governance and delivering value for money.

The ratings indicate when there is a cause for concern at a provider. It is important to note they do not automatically indicate a licence breach or trigger regulatory action. Rather, they prompt us to consider where a more detailed investigation may be necessary to establish the scale and scope of any risk.

**The risk assessment framework described in this document applies to NHS foundation trusts only; independent providers of NHS services should consult a separate [document](#).<sup>1</sup>**

### **Financial sustainability: continuity of services and financial efficiency**

Monitor has a statutory role to ensure the continued provision of key NHS services, as identified by commissioners. We also have a statutory role in ensuring effective governance of NHS foundation trusts, which includes financial governance and managing finances in a way that is economic, efficient and effective. The risk assessment framework helps us detect early signs of any financial risks that could

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<sup>1</sup> Available from: [www.gov.uk/government/publications/risk-assessment-framework-independent-sector-providers-of-nhs-services](http://www.gov.uk/government/publications/risk-assessment-framework-independent-sector-providers-of-nhs-services)

jeopardise an NHS foundation trust's financial standing and so threaten the continuity of the key services it provides, or indicates a financial governance concern.

If a provider looks likely to fail financially, its key services may need to be reconfigured to ensure they continue to be available to local patients. This reconfiguration is complex and time-consuming. Early notice of any potential failure therefore helps avoid disruption for patients and overburdening providers, and gives us time to assess the scope of the concerns and the best way to engage commissioners, patients and other stakeholders in addressing them quickly and effectively.

The **financial sustainability risk rating** is our view of the level of financial risk a foundation trust faces to the ongoing delivery of key NHS services and its overall financial efficiency. The rating ranges from 1, the most serious risk, to 4, the lowest risk. A rating indicating serious risk does not necessarily represent a breach of the provider licence. Rather, it reflects the degree of financial concern we have about a provider and consequently the frequency with which we will monitor it.

## **Governance**

NHS foundation trusts should be well governed; this includes how they oversee care for patients, deliver national standards and remain economic, efficient and effective. We use a range of methods to assess governance at NHS foundation trusts and to gain assurance that required governance standards are met. These include:

- A specified set of national metrics as proxies for overall standards of governance, including A&E waiting times, cancer waiting times and rates of C. difficile infection. In addition, when CQC has serious concerns about a trust, we consider whether it is in breach of its licence and what action is needed. When third parties bring information to us, such as patterns of patient complaints or infection outbreaks, we consider whether this is evidence of underlying governance issues.
- How individuals (both staff and patients) perceive their hospital: we track trends in specific staff and patient metrics, such as satisfaction ratings, staff turnover and absenteeism. We generally use this information in three ways: to corroborate other governance information; to help diagnose the cause of problems at a trust; to assess the ability of the trust to drive improvement. If we identify any causes for concern, we act proportionately and transparently, sharing our findings with the trust.
- Concerns raised by independently commissioned governance reviews: we believe well-run organisations should regularly and rigorously assess their governance. We have issued guidance on the well-led framework for governance reviews and the risk assessment framework recommends that

NHS foundation trusts commission an independent review of their governance at least every three years. We see this primarily as a way to encourage the development of governance assurance at trusts. However, if a review reveals there are significant unexpected governance issues driving a concern, we consider immediate steps to safeguard patients and services.

- Financial governance and efficiency concerns: we consider that well-governed organisations will remain solvent, operate efficiently and demonstrate robust financial planning and decision-making processes. Therefore, where we identify a material risk to a trust's financial sustainability or where a trust is not operating as efficiently as it could be, we consider the extent to which this reflects a governance issue. This could involve review of performance against the different elements of the financial sustainability risk rating.

The **governance rating** has three categories:

- green: we have no evident grounds for concern or we are not undertaking a formal investigation
- under review: we have identified a concern at a trust but not yet taken action; we provide a written description stating the issue(s) at hand
- red: we are taking enforcement action.

### **Revisions to the risk assessment framework in August 2015**

In June 2015 we consulted on a number of proposed changes to the risk assessment framework to reflect the challenging financial context in which foundation trusts are operating and to strengthen our regulatory regime to support improvements in financial efficiency across the sector.<sup>2</sup> The changes include:

- monitoring in-year financial performance and the accuracy of planning
- combining these two measures with the previously used continuity of services risk rating to produce a new four-level financial sustainability risk rating
- introducing a value for money governance trigger.

We've also reviewed the appropriate reporting requirements and as a result from August 2015 NHS foundation trusts will be required to submit financial information monthly as well as quarterly.<sup>3</sup>

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<sup>2</sup> [www.gov.uk/government/consultations/consultation-on-changes-to-the-risk-assessment-framework-june-2015](http://www.gov.uk/government/consultations/consultation-on-changes-to-the-risk-assessment-framework-june-2015)

<sup>3</sup> [www.gov.uk/government/publications/nhs-foundation-trust-bulletin-29-july-2015/ft-bulletin-29-july-2015](http://www.gov.uk/government/publications/nhs-foundation-trust-bulletin-29-july-2015/ft-bulletin-29-july-2015)

We've also included recent changes to relevant policies such as the removal of admitted and non-admitted referral to treatment targets.

Other changes to the text have been made to improve clarity and consistency of terminology where appropriate.

## 1. Introduction

### 1.1. What is the risk assessment framework?

Monitor is required by the Health and Social Care Act 2012 (the 2012 Act) to assess risks to the provision of NHS services and to publish guidance on action we may take if we identify risks. We are also required under the 2012 Act to oversee the governance of NHS foundation trusts.

The risk assessment framework (RAF) is the guidance we use to highlight concerns in the fulfilment of two conditions of the provider licence: continuity of services (CoS) and governance; this constitutes the guidance for the purposes of General Condition 5 – Monitor Guidance.<sup>4</sup> The NHS provider licence<sup>5</sup> also states that licensees should have regard for guidance Monitor may issue on corporate governance, financial management and the risk-rating methodology. The relevant licence conditions can be found in Appendix H.

This document concerns the RAF for **NHS foundation trusts**. The RAF for **independent providers** is outlined in a separate [document](#).

While all providers of NHS services are required to have a licence,<sup>6</sup> the RAF only applies to specific licence holders:

- Providers of commissioner requested services (CRS)<sup>7</sup> are subject to the CoS conditions in their licence. CRS are defined in Section 1.3.
- NHS foundation trusts are subject to the NHS foundation trust Condition 4 (Condition FT4; the governance condition) in their licence.

The framework is designed to highlight concerns in the areas outlined above. Monitor may follow up any identified concern by requesting further information or by opening a formal investigation. Further investigation is not automatic, and the identification of a concern does not automatically indicate a breach of the licence.

Monitor's approach comprises four stages (see Figure 1), the first three of which are covered by the RAF and stages 3 and 4 are covered by Monitor's [enforcement guidance](#):<sup>8</sup>

#### 1. **monitoring** the licence holders – see **Chapter 2**

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<sup>4</sup> States that licensees should have regard to guidance issued by Monitor for any of the purposes set out in Section 96(2) of the 2012 Act.

<sup>5</sup> Conditions CoS3 and FT4 (see Appendix H).

<sup>6</sup> Unless exempt pursuant to the National Health Service (Licence Exemptions, etc) Regulations 2013 (s1 2013/2677).

<sup>7</sup> Providers of CRS can be either foundation trusts or independent providers.

<sup>8</sup> Available from: [www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7](http://www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7)

2. **assessing risks** to compliance with the CoS and NHS foundation trust governance licence conditions – see **Chapters 3 and 4**
3. **investigating** potential breaches of licence conditions – see **Chapter 5** and Monitor’s enforcement guidance
4. **prioritisation and taking regulatory action** – see Monitor’s enforcement guidance. Where our concerns overlap those of CQC, we seek to align our regulatory approaches.

## 1.2. Principles

Our use of the RAF is consistent with the [Regulator’s Code](#)<sup>9</sup> and our established regulatory approach, which is:

- **patient-focused:** where we identify issues at licence holders, eg a risk to CoS, access or the governance of quality of care, we are guided by patient interests when assessing the need for action
- **evidence-based:** we base our actions on the available and relevant evidence
- **proportionate:** we ensure our actions address only the material risks identified so that we do not overreach our regulatory remit
- **transparent:** we strive to communicate clearly and openly to licence holders, commissioners and other stakeholders the reasons for any actions we take and to ensure our actions deliver the right outcomes for patients, commissioners and other stakeholders
- **co-operative:** we work with other regulators and organisations and, to avoid duplication of effort, we take their conclusions into account when deciding our regulatory approach.

## 1.3. Commissioner requested services and continuity of services

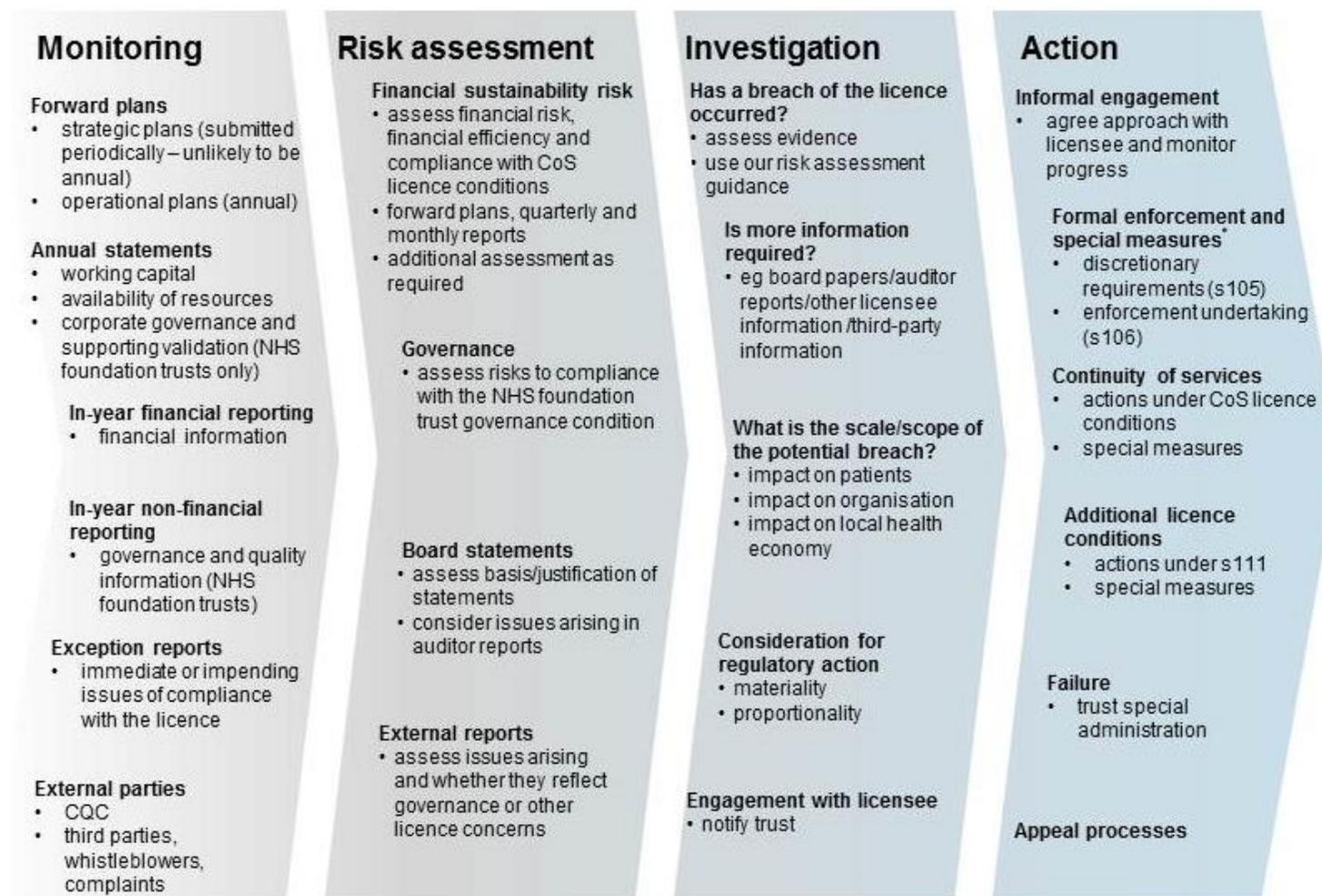
**CRS** are those services that local commissioners believe must continue to be delivered to local patients should the provider fail, where there is no alternative provider and where removing the services would significantly increase health inequalities or make other services unviable.

**Location specific services** (LSS) must meet the same criteria as CRS but are so designated when a provider is in trust special administration.

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<sup>9</sup> Available at: [www.gov.uk/government/publications/regulators-code](http://www.gov.uk/government/publications/regulators-code)

**Figure 1: Monitor’s approach to provider regulation**



\*Appeal processes exist for Monitor’s formal enforcement powers: for more information refer to the Act.

Note: this figure sets out indicative considerations. Monitor may take into account other relevant factors and take other action as appropriate.

Figure 2 shows the differences between all NHS services, CRS and LSS. Please refer to further guidance on the designation of [CRS and LSS](#).<sup>10</sup>

#### 1.4. Monitor's approach to risk assessment

The Act gives Monitor powers to require any information necessary or expedient for performing a number of our functions from a wide range of parties including licence holders. In addition, all licence holders are required by the terms of their licence to provide Monitor with any information we ask for to carry out our licensing functions. This includes assessing the risk of non-compliance with particular licence conditions.

We use the information collected to assess the risk to CoS licence conditions and non-compliance with the NHS foundation trust governance condition. We assign two assessment ratings to NHS foundation trusts:

- **A financial sustainability risk rating** describes the risk of a provider of CRS ceasing to be a going concern and its overall financial efficiency. This rating represents Monitor's view of the likelihood that a licence holder is, will be or could be in breach of the CoS licence Condition 3 and/or the provisions of the NHS foundation licence Condition 4 (governance) which relate to finance.
- **A governance rating** indicates Monitor's degree of concern about the governance of the trust, any steps we are taking to investigate this and/or any actions we are taking.

Where the assessments reflected in these ratings, or the information which underlies them, identify material issues of compliance with the licence conditions, we inform the licence holder and assess whether there is a need for further investigation and/or follow-up action (see Chapter 5 and Monitor's [enforcement guidance](#)).

We may also use the information collected to assess compliance with other licence conditions and for our other regulatory functions, as appropriate.

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<sup>10</sup> Available from:  
[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/308811/ToPublishFinalCRSGuidance28March13.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308811/ToPublishFinalCRSGuidance28March13.pdf)

**Figure 2: CRS and LSS at NHS foundation trusts**

Commissioners are responsible for ensuring CoS

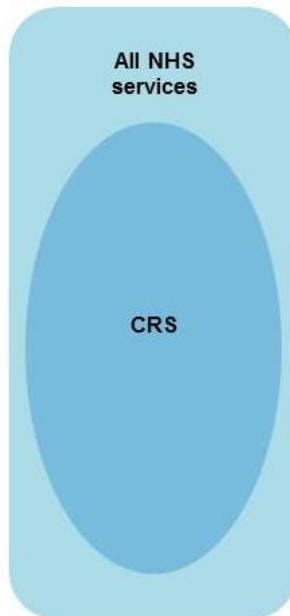
**Commissioner requested services (CRS)**

- services commissioners consider must continue to be provided locally in the event of provider failure
- CoS licence conditions apply to providers of CRS

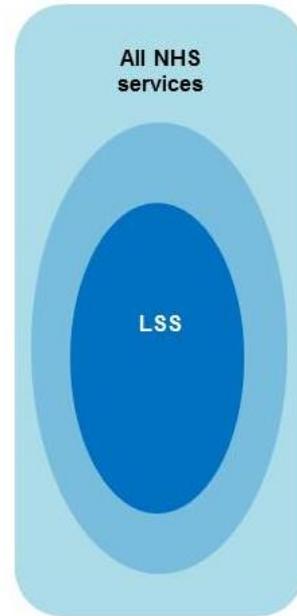
**Location specific services (LSS)**

- services with no alternative provider – must be kept running in event of provider failure
- commissioners with Monitor’s contingency planning teams will provisionally identify LSS when the provider is in distress
- where an NHS foundation trust is placed in special administration, the administrator will formally identify LSS
- at point of failure, LSS may only be a subset of CRS

Normal operations



Provider failure



## 2. Monitoring and data collection

### 2.1. Introduction

We look at a range of information, including regular financial submissions, plans and forecasts from NHS foundation trusts, and third-party information to assess foundation trusts for:

- financial sustainability risk, particularly risks related to the CoS licence conditions
- governance licence condition concerns (including operational and financial governance and financial efficiency).

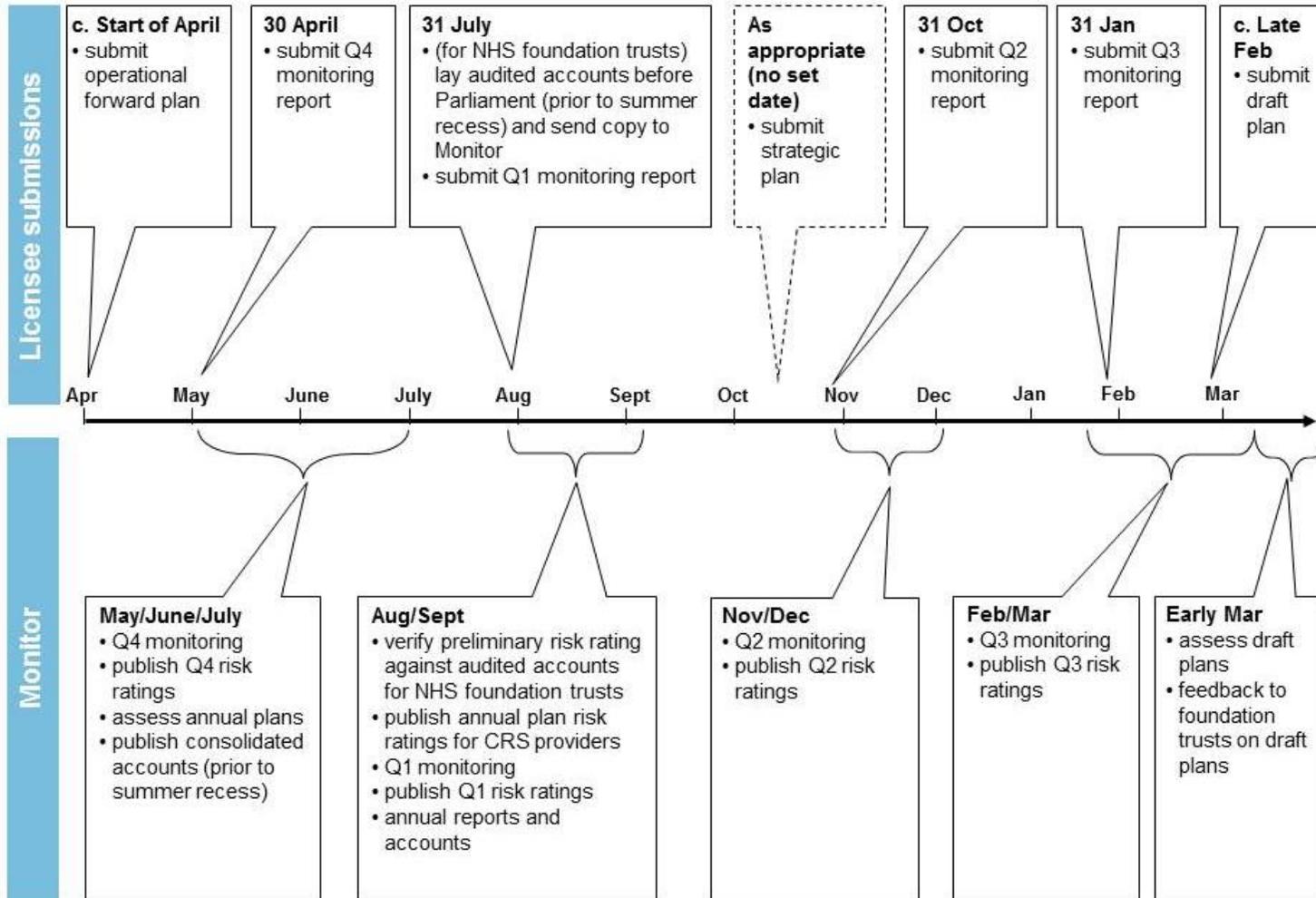
Figure 3 shows the annual monitoring cycle for NHS foundation trusts. The information we require may vary over the year according to the level of risk we have identified and any particular licence conditions applicable to it. For example, NHS foundation trusts are required to submit some information monthly and some quarterly. Occasionally, more frequent collections may be required depending on the risks identified.

We request information that is likely to be of the sort foundation trusts use, or should use, routinely for their own management. We believe much of it can be extracted from existing management information.

The RAF divides the information Monitor may request into four broad categories:

- **annual submissions:** strategic and operational plans, statutory reporting requirements of the licence holder and other annual requirements specified in the licence
- **in-year submissions:** financial and other service performance information submitted during the year, generally monthly and/or quarterly (see Section 2.3 for further details)
- **exception reports:** other information that may have material implications for a licence holder's compliance, but which is not routinely requested by Monitor, eg a report by a medical Royal College that identifies concerns relevant to the trust's governance of quality (and therefore to the trust's compliance with its licence)
- **other:** as part of the assurance Monitor requires regarding the governance of NHS foundation trusts, we expect trusts to commission periodic reviews of their governance and report the findings. Appendix B on the well-led framework gives further details on governance reviews.

Figure 3: Annual monitoring cycle for NHS foundation trusts



## 2.2. Annual submissions (see Table 1)

Annual submissions required by Monitor include:

- **A three- to five-year strategic plan or an update** of the existing strategic plan: submission of a full strategic plan is likely to be less frequent than annually as ultimately it should represent the output of a substantive strategy development exercise which organisations should not typically need to undertake annually. The exact timing of submission depends in part on the external context, for instance a major change in the policy environment. However, in years when a trust is not submitting a full strategic plan, Monitor may ask for a brief update of the strategy or any significant changes since the last submission. Please refer to the most recent annual planning guidance for further details.
- **Operational plans:** for 2015/16, foundation trusts have been asked to provide one-year operational plans. In future years this may differ and foundation trusts should refer to the most recent annual planning guidance for details.
- **Availability of resources statements**<sup>11</sup> and any other statements required under the licence or by other sources such as the RAF.

Monitor uses strategic and operational plans to assess risk to the sustainability of an NHS foundation trust's services over the medium to long term (see Chapter 3), and also the resilience of an NHS foundation trust to unforeseen risks (eg capacity and demand issues) over the short term.

### Additional information requirements

As well as the above reporting requirements, all NHS foundation trusts are subject to the following additional information requirements:

- Monitor is required to report the financial projections of NHS foundation trusts to the Treasury as part of the overall framework for financial assistance for these trusts. As a result, our requirements for financial projections from NHS foundation trusts may differ from those for other licence holders. We make every effort to keep any such additional reporting to a minimum.
- The Act gives powers to the Health and Social Care Information Centre to require information from all providers of NHS care, including NHS foundation trusts. The Information Centre can be required or asked to use these powers by a number of organisations, including the Secretary of State and NHS England.

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<sup>11</sup> As required under licence Condition CoS7.

**Table 1: Annual submissions for NHS foundation trusts**

	Element	Description
<b>Strategic overview</b>	<b>Commentary</b>	<ul style="list-style-type: none"> <li>• forward outlook including vision, strategy, external factors and risks to delivery</li> <li>• commentary including key assumptions and downside risks including an assessment of sustainability and development of scenarios to address sustainability</li> <li>• commentary on any investments</li> <li>• commentary on measures to assess and address risk to quality</li> <li>• commentary on identification, analysis and mitigation of significant risks to CRS</li> <li>• commentary on identification, analysis and mitigation of significant risks to compliance with the governance licence condition</li> <li>• commentary on identification, analysis and mitigation of any other significant risks to compliance with the licence</li> <li>• review of major non-financial issues</li> </ul>
<b>Governance and other statements</b>	<b>Corporate governance statement and supporting validation</b>	<ul style="list-style-type: none"> <li>• statement of compliance with the NHS foundation trust governance condition</li> <li>• statement of forward compliance with the NHS foundation trust governance condition</li> <li>• specification of any risks to compliance with the NHS foundation trust governance condition</li> <li>• actions planned to manage these risks</li> </ul> <p><b>If requested:</b></p> <ul style="list-style-type: none"> <li>• auditor statement that:               <ul style="list-style-type: none"> <li>○ the NHS foundation trust has taken the actions set out in the corporate governance statement applicable to the previous year</li> <li>○ sets out the areas where, in its view and after making reasonable inquiries, the licensee has failed to take the actions set out in its corporate governance statement applicable to the previous year</li> </ul> </li> </ul>
	<b>Governor development and membership report</b>	<ul style="list-style-type: none"> <li>• commentary on governor development activity in previous years and plans for the coming 12 months</li> <li>• membership data including present and projected membership by constituency, election turnout rates and stratified comparisons with eligible groups</li> <li>• commentary on membership strategy</li> </ul>
<b>Finance</b>	<b>Financial projections</b>	<ul style="list-style-type: none"> <li>• forward projections (income and expenditure, balance sheet, cash flow)</li> <li>• actual results against plan for past year with commentary explaining variances</li> </ul>

- The Act gives powers to the Department of Health (DH) to request information from NHS foundation trusts.
- Monitor may require additional information through forward plans, or monthly or quarterly reporting, on behalf of these national organisations. We generally only request these when it is easier for licence holders to submit information through our processes than through a separate collection. We indicate where this is the case.

### **Corporate governance statement**

To comply with the governance condition of their licences, NHS foundation trusts are required to provide a 'corporate governance statement' setting out:

- any risks to compliance with the governance condition
- actions taken or being taken to maintain future compliance.

Where facts come to light that question information in the corporate governance statement, or indicate that an NHS foundation trust may not have carried out planned actions, Monitor is likely to seek additional information from the NHS foundation trust to understand the underlying situation. Depending on the trust's response, we may decide to investigate further to establish whether there is a material governance concern that merits further action.

### **Annual reports and accounts**

NHS foundation trusts are required (under the National Health Service Act 2006 (the 2006 Act)) to submit to Monitor their annual report and audited annual accounts. Monitor consolidates the accounts for submission to Parliament and inclusion in the DH's group accounts.

### **Governor and membership reporting**

NHS foundation trusts should maintain a representative membership base; Monitor requires information from trusts on members and membership elections.

### **2.3. In-year submissions**

Monitor also requires NHS foundation trusts to provide financial information during the year. Financial information will generally be collected both monthly and quarterly from August 2015. Governance information (such as performance against national access and outcome measures) will generally be collected quarterly, but this may vary depending on a particular provider's risk to compliance with the licence. We only publish quarterly risk ratings on our website.

Table 2 shows the main categories of in-year submissions for NHS foundation trusts.

**Table 2: In-year submissions for NHS foundation trusts**

	<b>Element</b>	<b>Description</b>
<b>Financial</b>	<p><b>Most recent monthly and quarterly financials*</b></p> <p><b>Year-to-date financials</b></p> <p><b>Financial commentary</b></p> <p><b>Forward financial events</b></p>	<p>Information to assess <b>financial sustainability risk</b>:</p> <ul style="list-style-type: none"> <li>• liquidity</li> <li>• capital service coverage</li> <li>• income and expenditure (I&amp;E) margin</li> <li>• variance from plan (I&amp;E margin)</li> </ul> <p>Information to assess overall <b>financial performance</b>:</p> <ul style="list-style-type: none"> <li>• I&amp;E, balance sheet, cash flow against annual plan</li> <li>• commentary on sources of variance versus plan</li> <li>• commentary on any exceptional cost (eg restructuring or impairment charges) and exceptional revenue items</li> <li>• notifications of any material transactions or changes to capital structure</li> <li>• notifications of any material changes in financial circumstances, ie CapEx delays</li> </ul>
<b>Non-financial</b>	<b>Governance and other information</b>	<p>Information to assess <b>organisational and financial governance</b>, including service performance and care quality:</p> <ul style="list-style-type: none"> <li>• performance against national standards</li> <li>• CQC information</li> <li>• clinical quality metrics</li> <li>• value for money metrics</li> </ul> <p>Information to assess <b>membership engagement</b>:</p> <ul style="list-style-type: none"> <li>• membership and election information</li> <li>• information required for Monitor’s registrar and other NHS foundation trust powers</li> </ul>

\*Monitor collects this financial information from NHS foundation trusts even in the absence of CRS.

### **Exceptional in-year reports**

Heightened risks to compliance at a licence holder may trigger additional in-year requirements. Where material change in an NHS foundation trust’s financial prospects is signalled by, for example, transactions, adverse trading movements or cost increases, or material deterioration in financial performance, then Monitor is likely to request a financial reforecast from which to recalculate the provider’s risk rating.

### **Additional in-year submissions**

Monitor’s statutory governance oversight role means we require a greater level of information more regularly from NHS foundation trusts than is required from other

providers. To carry out our role, we routinely collect or monitor additional information regarding:

- **Performance against mandated standards of access and outcomes:** Monitor considers the ability of NHS foundation trusts to meet selected national standards for access and outcomes (such as waiting times in A&E or referral to treatment (RTT) times for elective care) to be an important indicator of the effectiveness of the organisation's governance. We collect information from NHS foundation trusts each quarter to assess their performance against these standards. A full list of the national metrics informing our assessment of governance at NHS foundation trusts is given in Appendix A.
- **CQC inspections and judgements:** The licence requires NHS foundation trusts to have systems in place that deliver care of sufficient quality to patients. CQC has primary responsibility for ensuring NHS foundation trusts meet clinical quality standards and while Monitor does not intend to duplicate this regulation, issues relating to quality of care can arise from or reflect poor governance.

Monitor takes into account the findings of any inspection under CQC's new regulatory regime when considering if it will investigate a trust. If following an inspection CQC decides to take enforcement action, Monitor may investigate and consider whether a trust is in breach of its licence. Foundation trusts are required to report to us the outcomes of a CQC inspection or review.

Following an inspection CQC may also recommend that Monitor places a foundation trust in [special measures](#).<sup>12</sup>

We also consider whether CQC judgements in other relevant areas, such as those covered by the fit and proper persons requirements and the duty of candour contained in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, are relevant to the compliance by NHS foundation trusts with their governance condition.

- **Organisational health indicators:** Monitor has identified a number of organisational health indicators that may indicate a risk to the current or future quality of care provided by an NHS foundation trust, including results from patient and staff surveys, staff turnover and agency staff numbers.

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<sup>12</sup> Further guidance on special measures is available from:  
[www.gov.uk/government/publications/special-measures-a-guide-for-nhs-trusts-and-foundation-trusts](http://www.gov.uk/government/publications/special-measures-a-guide-for-nhs-trusts-and-foundation-trusts)

We are unlikely to start a formal investigation based on performance against these indicators alone. We generally use these indicators in three ways:

- during monitoring – to corroborate other governance concerns identified by, for example, performance against nationally defined outcome and access measures, or CQC judgements
- during an investigation – to help diagnose the causes of poor performance
- during an investigation or once a trust has been found to be in breach – to help assess the trust’s ability to turn around performance.

We recognise that not all of these indicators are available monthly or quarterly, so we require NHS foundation trusts to submit them as they become available.

Chapter 4 gives further detail on the information Monitor uses to assess governance at NHS foundation trusts.

#### **2.4. Exception reports**

We expect NHS foundation trusts to notify us in writing of any incidents, events or reports that may reasonably be regarded as raising potential concerns over compliance with their licence. This expectation applies to all licence conditions, not just the conditions that are the focus of the RAF.

We also require NHS foundation trusts to inform us of events that could have an impact on the operation of their business. We may then assess their impact on the trust’s compliance with the licence. Examples of such events are:

- undertaking a major acquisition, investment or divestment
- losing a significant contract
- a significant change in capital structure
- a material deterioration in financial performance
- an immediate need to spend significant sums to meet regulatory requirements (eg increased costs as a result of a requirement from CQC).

An exception report should describe:

- the issue that has arisen or will arise, the area of the licence that it affects, the magnitude of the issue and when it will have an effect or when it occurred
- any actions planned to address the issue

- a list of any affected parties
- if it hasn't done so already, how the licence holder plans to notify relevant parties of the issue and address any impact on them.

Examples of issues concerning CoS or governance at NHS foundation trusts (and therefore falling under the scope of the RAF) that require exception reports are listed in Table 3.

### **Actions on receiving an exception report**

Monitor may require additional information from an NHS foundation trust following receipt of an exception report, to assess the effect on compliance with its licence. Where the exception represents a material risk to the NHS foundation trust's ability to continue as a going concern, Monitor considers applying an override to the trust's financial sustainability risk rating (see Chapter 3).

### **Reporting transactions and other exceptional financial events**

Licence holders should report to Monitor:

- UK healthcare investments or other transactions worth >10% of their assets, revenue or capital
- any planned change in capital structure that represents >10% of their capital employed over a 12-month period.

On receiving these reports, we may conduct our own risk assessment of the transaction from the perspective of governance as well as financial sustainability (see Chapter 3). Our level of scrutiny will be proportional to: the nature and volume of CRS provided by the affected licence holder; the share of the licence holder's overall business represented by CRS; and the nature of the risk in question.

Where Monitor believes the quality and robustness of plans underpinning these transactions are inadequate, we may undertake further investigations into a trust's governance. If necessary, we can take regulatory action to address significant transaction-related concerns.<sup>13</sup>

These requirements are separate and additional to the requirement under the Act for NHS foundation trusts to make applications to Monitor about particular types of transaction, eg acquisitions and separations. Monitor may also make further provision outside the RAF to meet the requirements for such applications.

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<sup>13</sup> The requirement of NHS foundation trusts to make exception reports regarding transactions is without prejudice to Monitor's statutory powers to approve certain transactions on the part of NHS foundation trusts.

**Table 3: Examples of where an exception report is required**

	Examples
<b>Continuity of services</b>	<ul style="list-style-type: none"> <li>• unplanned significant reductions in income or significant increases in costs</li> <li>• discussions with external auditors which may lead to a qualified audit report</li> <li>• future transactions potentially affecting the financial sustainability risk rating</li> <li>• risk of a failure to maintain registration with CQC for CRS</li> <li>• loss of accreditation of a CRS</li> <li>• proposals to vary CRS provision or dispose of assets, including:               <ul style="list-style-type: none"> <li>○ cessation or suspension of CRS</li> <li>○ variation in asset protection processes</li> </ul> </li> <li>• proposed disposals of CRS-related assets</li> </ul>
<b>Financial governance</b>	<ul style="list-style-type: none"> <li>• requirements for additional working capital facilities</li> <li>• failure to comply with the statutory reporting guidance</li> <li>• adverse report from internal auditors</li> <li>• significant third-party investigations or reports that suggest potential material issues with governance</li> <li>• CQC inspections and their outcomes</li> <li>• performance penalties to commissioners</li> </ul>
<b>Governance</b>	<ul style="list-style-type: none"> <li>• third-party investigations or reports that could suggest material issues with financial, operational, clinical service quality or other aspects of the trust's activities that could indicate material issues with governance</li> <li>• CQC responsive or planned inspections and the outcomes/findings</li> <li>• changes in chair, senior independent director or executive director</li> <li>• any never events*</li> <li>• any patient suicide, homicide or absconsion (mental health trusts only)</li> <li>• non-compliance with safety and security directions and outcomes of safety and security audits (providers of high security mental health services only)</li> <li>• other serious incidents or patient safety issues that may impact compliance with the licence (eg serious incidents, complaints)</li> </ul>
<b>Other risks</b>	<ul style="list-style-type: none"> <li>• enforcement notices or other sanctions from other bodies implying potential or actual significant breach of a licence condition</li> <li>• patient group concerns</li> <li>• concerns from whistleblowers or complaints</li> <li>• any significant reputation issues, eg any adverse national press attention</li> </ul>

\*Never events should always be reported to us at the same time as to commissioners, even if they will later be deemed not to be never events.

Appendices C to E give more information on the information licence holders should include in submissions and the additional requirements of NHS foundation trusts for transactions.

## **Additional exception reporting requirements**

NHS foundation trusts should always report to Monitor any further information that could reasonably be regarded to have the potential to affect their compliance with their governance licence condition.

Many third parties, including other regulators, auditors, medical Royal Colleges, training establishments and coroners, comment on and review aspects of an NHS foundation trust's performance. We do not require NHS foundation trusts to send us each and every report that includes commentary or observation on their performance. However, we do require trusts to inform us of reports that can reasonably be regarded as raising potential concerns over a trust's current or potential compliance with licence conditions, in particular the NHS foundation trust governance condition. In addition, NHS foundation trusts that provide high security mental health services are required to report non-compliance with the Secretary of State's safety and security directions, any significant issues relating to safety and security audits and serious incidents in line with their serious incident and reporting policy.

As part of Monitor's capital expenditure monitoring role (on behalf of the Treasury), NHS foundation trusts should inform us if capital expenditure for the remainder of the year is likely to diverge by 15% (above or below) from the amount in their annual plans. We may then request a capital expenditure reforecast for the remainder of the year.

## **NHS foundation trusts: independent governance assurance and regular reviews**

The [Code of governance for NHS foundation trusts](#)<sup>14</sup> requires a trust to:

- ensure adequate systems and processes are maintained to measure and monitor its economy, efficiency and effectiveness as well as the quality of the healthcare it delivers. The board should regularly review performance in these areas against regulatory and contractual obligations and approved plans and objectives
- conduct at least annually a review of the effectiveness of its system of internal control and report to members that it has done so. The review should cover all material controls, including financial, clinical, operational and compliance controls, and risk management systems.

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<sup>14</sup> Available from:  
[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/327068/CodeofGovernanceJuly2014.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/327068/CodeofGovernanceJuly2014.pdf)

This mirrors a provision in the UK Code of Corporate Governance<sup>15</sup> that: “The board should, at least annually, conduct a review of the effectiveness of the company’s risk management and internal control systems and should report to shareholders that they have done so.”

Monitor builds upon these provisions by requiring NHS foundation trusts to commission a rigorous external review of governance at least once every three years. Our guidance on the well-led framework for governance reviews supports a minimum standard of assurance for these reviews and includes examples of good practice.<sup>16</sup> It states that foundation trusts should look at four different domains:

- **strategy and planning** – how well is the board setting direction for the organisation?
- **capability and culture** – is the board taking steps to ensure it has the appropriate experience and ability now and into the future, and can it positively shape the organisation’s culture to deliver care in a safe and sustainable way?
- **process and structures** – do reporting lines and accountabilities support the effective oversight of the organisation?
- **measurement** – does the board receive appropriate, robust and timely information and does this support the leadership of the trust?

Monitor sees well-led reviews primarily as an opportunity to develop the sector’s processes for building governance assurance. Provided these commissioned reviews cover the scope set out in the guidance, NHS foundation trusts are free to set their overall scope.

NHS foundation trusts should report the findings to Monitor. Any reported issues of concern may reflect on compliance with the governance condition and we then consider whether to investigate further (see Chapter 4).

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<sup>15</sup> Published by the Financial Reporting Council.

<sup>16</sup> Available from:

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/312988/well\\_led\\_framework\\_governance\\_reviews\\_1\\_.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312988/well_led_framework_governance_reviews_1_.pdf)

### 3. Assessing financial sustainability risk: continuity of services and financial efficiency

#### 3.1. Introduction

An assessment under Monitor’s financial sustainability risk framework aims to identify whether the financial position of an NHS foundation trust that is a provider of CRS could place its services at risk and whether there may be wider issues relating to financial efficiency. As the measures necessary to address financial issues – internal restructuring, local reconfiguration or, where appropriate, special administration – are complex and time-consuming, we try to identify financial issues at NHS foundation trusts early on. Early warning allows us to take the necessary steps to safeguard services and address financial issues while minimising disruption and uncertainty for patients.

This chapter describes how Monitor assesses the degree of financial risk at a CRS provider that is an NHS foundation trust and whether this reflects a potential breach of the CoS licence conditions or the NHS foundation trust governance condition (Condition FT4). The CoS licence conditions are summarised in Table 4.

**Table 4: Requirements of the continuity of services licence conditions**

CRS providers are required to...	...resulting in
<b>Be financially viable</b>	<ul style="list-style-type: none"> <li>no financial concerns as per Monitor’s risk rating (<b>Condition CoS3</b>)</li> </ul>
<b>Co-operate with Monitor</b>	<ul style="list-style-type: none"> <li>in cases of financial concern, licensees must co-operate with Monitor, including providing information to commissioners and allowing parties identified by Monitor to enter premises (<b>Condition CoS6</b>)</li> </ul>
<b>Provide assurance on commitment and capability to provide CRS</b>	<ul style="list-style-type: none"> <li>assurance from ultimate controller* (<b>Condition CoS4</b>)</li> <li>assurance on ability to provide CRS (<b>Condition CoS7</b>):               <ul style="list-style-type: none"> <li>annual availability of resources statement highlighting any factors affecting the capability to deliver CRS</li> <li>working capital statement</li> <li>in-year exception reporting</li> </ul> </li> </ul>
<b>Maintain CRS provision</b>	<ul style="list-style-type: none"> <li>approval of Monitor and commissioners required to change CRS (<b>Condition CoS1</b>)</li> <li>retain assets required to provide CRS (<b>Condition CoS1</b>)</li> </ul>

\*This does not apply to foundation trusts.

The relevant provisions of Condition FT4 are:

- foundation trusts must establish and effectively implement systems and processes to ensure compliance with the duty to operate economically, efficiently and effectively (see Condition FT4 paragraph 5(a); Appendix H)

- foundation trusts must establish and effectively implement systems and processes for effective financial decision-making, management and control (see Condition FT4 paragraph 5(d); Appendix H).

Actions we may take include:

- further investigation or a requirement to work with Monitor-appointed experts and/or enforcement proceedings in circumstances where we consider a foundation trust may be in breach of licence Condition CoS3 or Condition FT4 (governance)
- inserting additional conditions into the licence to address circumstances where we believe the governance of an NHS foundation trust is such that it is failing, or will fail, to comply with the conditions of its licence, including CoS
- informing the relevant commissioning organisations – the Act obliges Monitor to do this in circumstances where we believe that a provider is at risk of no longer being a going concern, and that one of the major causes of that risk is the local configuration of services
- investigating the situation and potentially initiating contingency planning to prepare for organisational restructuring, service reconfiguration or trust special administration in circumstances where Monitor is concerned about the ability of a provider to continue as a going concern.

CRS comprise the bulk of activities for some licence holders while only a small proportion for others. However, financial risk to the organisation overall may endanger its ability to provide CRS even if these services represent only a small part of overall operations. Monitor therefore considers, where relevant and proportionate, risk at the level of the overall entity providing the service.

Monitor regularly considers the planned and actual financial performance and uses this information to calculate the financial sustainability risk rating.

### 3.2. Assigning the financial sustainability risk rating

The financial sustainability risk rating incorporates the following measures of financial robustness and efficiency (see Table 5):

- **liquidity:** days of operating costs held in cash or cash-equivalent forms, including wholly committed lines of credit available for drawdown
- **capital servicing capacity:** the degree to which the organisation's generated income covers its financing obligations
- **income and expenditure (I&E) margin:** the degree to which the organisation is operating at a surplus/deficit

- **variance from plan in relation to I&E margin:** variance between a foundation trust’s planned I&E margin in its annual forward plan and its actual I&E margin within the year.

Monitor considers these measures should be calculated as part of a board’s normal financial reporting, so preparing and submitting them should not add an undue burden to licence holders. Detailed definitions of these measures are included with the reporting templates Monitor issues to NHS foundation trusts each year.

**Table 5: Calculating the financial sustainability risk rating for NHS foundation trusts**

	Financial criteria	Weight (%)	Metric	Rating categories**			
				1*	2***	3	4
Continuity of services	Balance sheet sustainability	25	Capital service capacity (times)	<1.25x	1.25 - 1.75x	1.75- 2.5x	>2.5x
	Liquidity	25	Liquidity (days)	<(14) days	(14)-(7) days	(7)-0 days	>0 days
Financial efficiency	Underlying performance	25	I&E margin (%)	≤(1)%	(1)-0%	0-1%	>1%
	Variance from plan	25	Variance in I&E margin as a % of income	≤(2)%	(2)-(1)%	(1)-0%	≥0%

\*Scoring a 1 on any metric will cap the weighted rating to 2, potentially leading to investigation.

\*\*Scores are rounded to the nearest number, ie if the trust scores 3.6 overall, this will be rounded to 4; if the trust scores 3.4, this will be rounded to 3.

\*\*\*A 2\* rating may be awarded to a trust where there is little likelihood of deterioration in its financial position.

The overall score informs Monitor’s regulatory approach towards the foundation trust in question (see Table 6):

- **Financial sustainability risk rating 4:** we generally take no action beyond continuing to monitor the licence holder, as described in Chapter 2. We require financial information to be submitted monthly and quarterly. We do not expect boards to have to sign off monthly data returns as this information is intended to provide additional visibility during the quarterly monitoring process.

- **Financial sustainability risk rating 3:** we continue to monitor the licence holder, as described in Chapter 2. We may ask for additional information to assess certain aspects of the foundation trust's position. We require financial information to be submitted monthly and quarterly. We do not expect boards to have to sign off monthly data returns as this information is intended to provide additional visibility during the quarterly monitoring process.
- **Financial sustainability risk rating 2:** this rating is likely to represent a material level of financial risk. If a foundation trust is rated '1' on any individual component of the financial sustainability risk rating, its overall score will be capped at 2. Depending on the level of concern our response may include:
  - **immediate issues requiring action:** we may investigate whether the trust is in breach of the CoS licence conditions, including Condition CoS3, or the NHS foundation trust Condition FT4 – the aspects of the condition relating to finance matters (and subsequently take enforcement action if a breach or likely breach is identified). We may also collect additional information from the licence holder to examine its financial position before deciding whether further regulatory action is required
  - **an increased level of risk requiring closer monitoring:** we may request information on a more frequent basis to pre-empt or respond quickly to any serious issues should they emerge.
- **Financial sustainability risk rating 2\*:** where a provider has a risk rating of 2 and we have a high degree of confidence in the provider maintaining or improving its financial position, we assign a rating of 2\* and continue to monitor the provider on a monthly and quarterly basis. If the provider continues to return a rating of 2, we again consider whether a rating of 2 or 2\* is merited. We anticipate only a limited number of providers will be assigned a 2\* rating.
- **Financial sustainability risk rating 1:** for licence holders demonstrating a significant level of financial risk, we:
  - may consider using our powers under the licence to initiate a contingency planning process, assessing the financial position of the provider and the best options to address it that minimise disruption to patients
  - are likely to investigate whether the trust is in breach of the CoS licence conditions, including Condition CoS3, or the NHS foundation trust Condition FT4 (the aspects relating to finance matters)
  - monitor more closely by collecting financial information on a monthly or more frequent basis

- may consider formal enforcement action (if a breach or likely breach of the licence conditions is identified), as well as specific requirements within the terms of the CoS licence conditions, including co-operating with a Monitor-appointed contingency planning team or other financial experts.

**Table 6: Financial sustainability risk ratings and their regulatory implications**

Financial sustainability risk rating	Description	Regulatory activity
4	No evident concerns	None
3	Emerging or minor concern potentially requiring scrutiny	Potential enhanced monitoring
2*	Level of risk is material but stable	Potential enhanced monitoring
2	Material risk	Potential investigation (see Chapter 5)
1	Significant risk	Likely investigation (see Chapter 5) Potential appointment of contingency planning team

\*Weighted average, rounded to nearest number, across the components of the financial sustainability risk rating.

### 3.3. Trust special administration

When an NHS foundation trust is unable, or likely to be unable, to remain a going concern, then we may place it into trust special administration.<sup>17</sup>

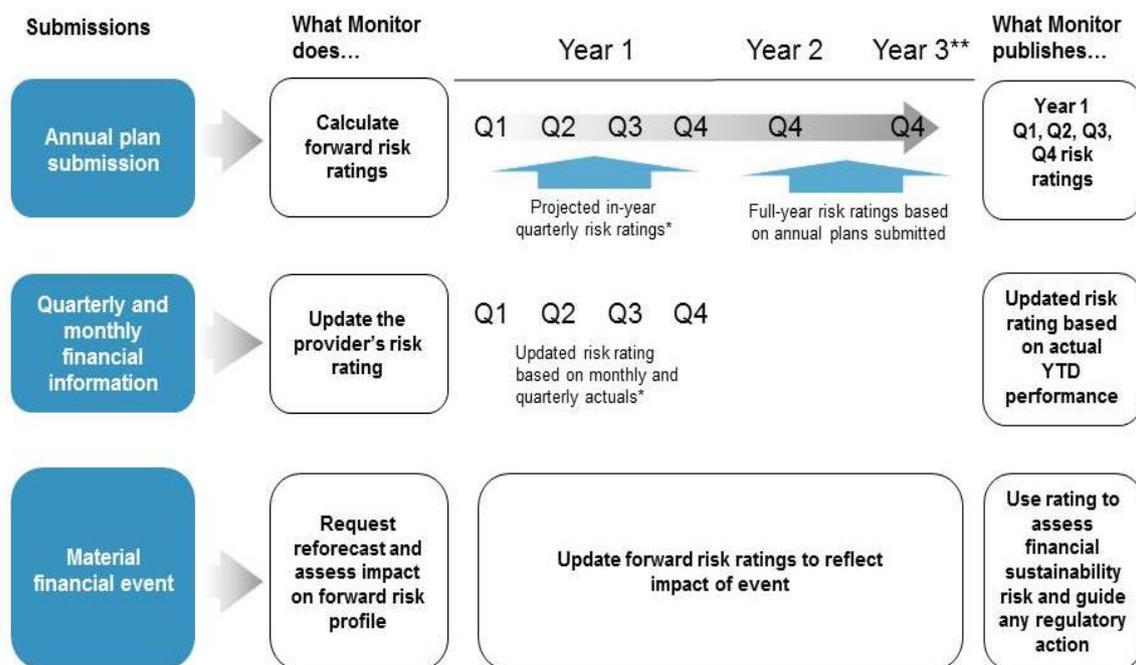
<sup>17</sup> The administrator's role is to work with commissioners and other local healthcare organisations to produce a plan for the reorganisation and sustainable delivery of healthcare services.

### 3.4. Monitoring financial sustainability risk

Figure 4 shows how we monitor and assess financial risk both regularly and by exception. We:

- use **operational plans** to calculate the financial sustainability risk rating quarterly over the coming 12 months and for the next one to two years following that<sup>18</sup>
- on a **quarterly and monthly** basis, compare the risk rating against quarterly and monthly financial performance information
- assess the impact of **ad hoc or 'exceptional'** financial events with material potential impact on the CRS provider's financial prospects.

**Figure 4: Process of monitoring the financial sustainability risk rating**



\*Calculated on year-to-date (YTD) information.

\*\*Potentially up to Year 5.

### Strategic and operational plans

NHS foundation trusts annually submit operational plans to Monitor that usually cover the next one to two years of operations. On the basis of these plans we assess risks to their ability to continue as a going concern, to address short-term performance issues and to achieve quality, and operational and financial resilience over the short term. These are most likely submitted at the beginning of the

<sup>18</sup> The timeframe we ask operational plans to cover may vary from year to year. Foundation trusts should follow the most recent annual planning review guidance.

financial year in April (see Figure 3 and Table 1 and most recent annual planning guidance).

On a less frequent basis, NHS foundation trusts may also be required to submit strategic plans, likely to cover the next three to five years of operations. These plans should represent the output of a substantive strategy development exercise undertaken by an NHS foundation trust, and therefore it would not be appropriate for them to be submitted annually. However, we may ask for an annual strategy update instead. The timing of submission of strategic plans in part depends on the external context, for instance a major change in the policy environment. NHS foundation trusts should refer to Monitor's most recently published annual planning review guidance. On the basis of these strategic plans and their underlying financial projections, we assess risks to the NHS foundation trust's ability to provide high quality care to its patients on a sustainable basis.

#### *What Monitor does with this information*

Monitor evaluates both strategic and operational plans in two stages. The first stage is a desk-based review to identify plans requiring further scrutiny. A subset of these plans, selected on the basis of financial risk and our existing knowledge of the issues, may be subjected to a more detailed second stage of analysis. We may also stress test the trust's plans against common assumptions and scenarios to support our review of the plans.

Where we subject a licence holder's forward plan to the second stage of analysis, its financial sustainability risk rating may remain provisional until this stage is completed. Where the overall quality of its strategic and operational plans is poor and stress testing of these plans indicates potential concerns, we may consider further investigation.

Where a submitted annual plan indicates a prospective risk to CoS (ie a risk rating of 1 or 2 at any stage over the plan period but particularly in the next 12 months), we may consider whether further investigation is necessary to determine what, if any, regulatory action is appropriate. Where we identify a material risk to a trust's financial sustainability we consider the extent to which this reflects a governance issue. Where appropriate, we may move immediately to formal enforcement or other regulatory action if we consider this necessary to safeguard key services. This may include asking for a full multi-year turnaround plan.

Having reviewed a licence holder's operational plan, we publish the quarterly risk profile over the coming year, ie the prospective rating at the end of each quarter.

#### **In-year submissions**

Monitor uses financial submissions, quarterly and monthly to calculate each provider's year-to-date financial sustainability risk rating.

### *What Monitor does with this information*

If there is a material difference between the in-year financial submissions and the relevant period of the annual plan, we may require licence holders to explain the reasons for this and the actions they propose to take to address the gap.

Each quarter, we publish the financial sustainability risk rating calculated from year-to-date submissions. Monthly risk ratings are not published. They provide us with additional visibility in between the quarterly monitoring process that allows us to identify and respond quickly to any deterioration in a foundation trust's financial position. If concerns are identified we may subsequently investigate whether the licence holder is in breach of its licence. Where the risk rating reflects a higher risk than the most recently published rating (ie the rating published at the annual plan stage or for a previous quarter), our next steps are based on the most recent risk rating. Conversely, where the rating represents a lower level of risk than planned, we consider whether or not to reflect this in the regulatory stance we take towards the provider.

Where the quarterly rating is 1 or 2, reflecting a potential breach of the licence, we consider whether closer monitoring, requesting further information or other action under the licence is necessary to establish whether the provider complies with the CoS or governance licence conditions and, if not, whether regulatory action is appropriate.

### **Exception reports, financial overrides and reforecasts**

Material in-year changes in providers' financial circumstances can have significant implications for their financial sustainability, for example:

- CQC warning notices or other enforcement action can lead to increases in costs to meet quality and safety requirements
- material transactions can have far-reaching consequences for revenues and costs
- material in-year deteriorations from plans can affect financial sustainability
- losing a major contract can leave an organisation with significant 'stranded' assets and costs, at least for a period
- refinancing may affect a provider's ability to service its financing costs
- exceptional/one-off income may conceal a licence holder's true financial position.

In addition, providers may experience several smaller changes that lead cumulatively to a material deviation from the plan and consequently a concern for the sustainability of services provided.

### *What Monitor does with this information*

Where a licence holder reports a **material financial event** (see Section 2.4), we revise the licence holder's risk rating (see Figure 5). In such circumstances, we may:

- require a plan reforecast for the remainder of the financial year or the next financial year(s) to recalculate the provider's prospective financial sustainability risk rating<sup>19</sup> or
- conclude that the financial outlook for the licence holder warrants an immediate override.

We are unlikely to require a reforecast for every CQC warning notice or enforcement action, transaction, change in contract or refinancing. Some of these changes may have little financial impact, while others could involve considerable sums. For a transaction, Monitor requires a reforecast if the transaction meets the thresholds set out in our guidance (see Appendix C). Where the trust's prospective risk rating changes as a result of this reforecast, we use this new rating as the basis for any regulatory action.

In cases of deterioration in **financial performance**, we may consider a reforecast where there is a difference of  $\geq 20\%$  between forecast and expected performance in:

- revenue available for debt service
- capital service costs or
- where liquidity falls by 20% or seven days, whichever is lower.

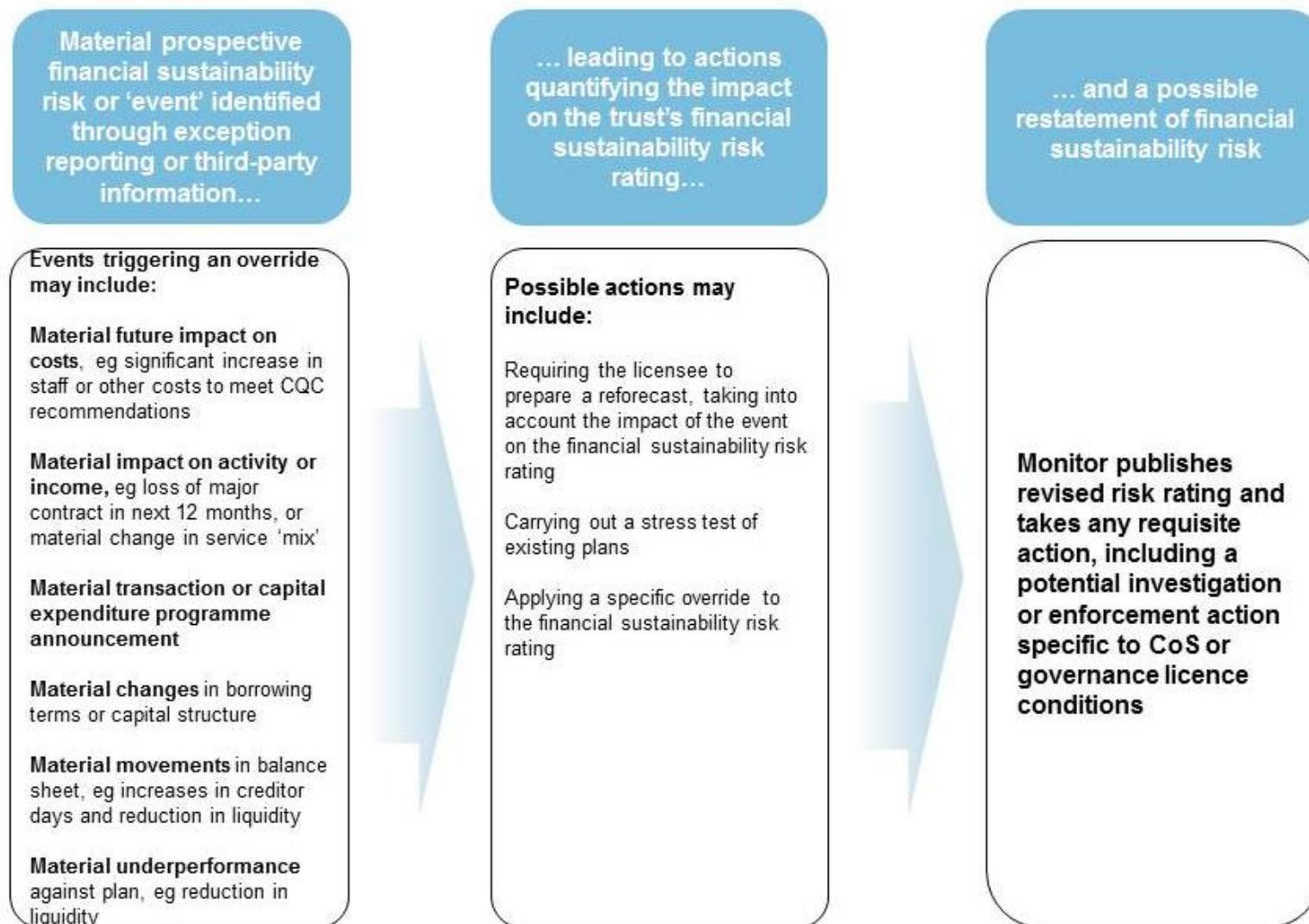
For other exceptional events, including CQC warning notices or other enforcement action and refinancing, we consider requesting a reforecast only where it appears the event will result in a material change in the provider's financial projections.

Where the **reforecast following the event indicates a prospective risk rating of 1 or 2** at any stage over the reforecast period, we consider whether to undertake further investigation or action under the CoS licence conditions, such as requiring closer co-operation with Monitor or parties appointed by us to minimise the financial risk identified.

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<sup>19</sup> We may request NHS foundation trusts displaying material variances between forward plan and year-to-date performance at Q2 supply a six-month update of financial projections in-year. This reforecast will reflect the priorities of the forward plan, but with explanations required only for any significant variances, key risks to compliance with the CoS and governance conditions, and action plans to rectify the position.

**Figure 5: Reforecasting process for the in-year financial sustainability risk rating**



We may also use our powers to request further information to assess the degree of risk. We may consider whether the prospective risk to CoS results from governance issues, eg a poor plan or inadequate response to the external operating pressures, and if it does, determine our appropriate regulatory response.

## 4. Assessing NHS foundation trust governance

### 4.1. Introduction

The status of NHS foundation trusts is reflected in four additional conditions in their licence (see Appendix H). NHS foundation trust Conditions FT1, 2 and 3 contain important administrative and other requirements, while Condition FT4 (the governance condition) sets out the overall standards for different aspects of NHS foundation trust governance. The scope of the governance condition reflects Monitor's long-standing expectations regarding effective governance as described in published guidance and our regulatory action to date.

This chapter describes how Monitor uses the RAF to assess trusts' governance through the licence.

Where there is evidence that an NHS foundation trust may be failing to meet the requirements of the governance condition, we are likely to investigate whether there may have been, or there is likely to be, a breach of the governance condition (see Chapter 5) and, if so, consider whether to take regulatory action. Our [enforcement guidance](#) provides further information on how we investigate potential breaches of the licence and make decisions on enforcement action.

### 4.2. Assigning a governance rating

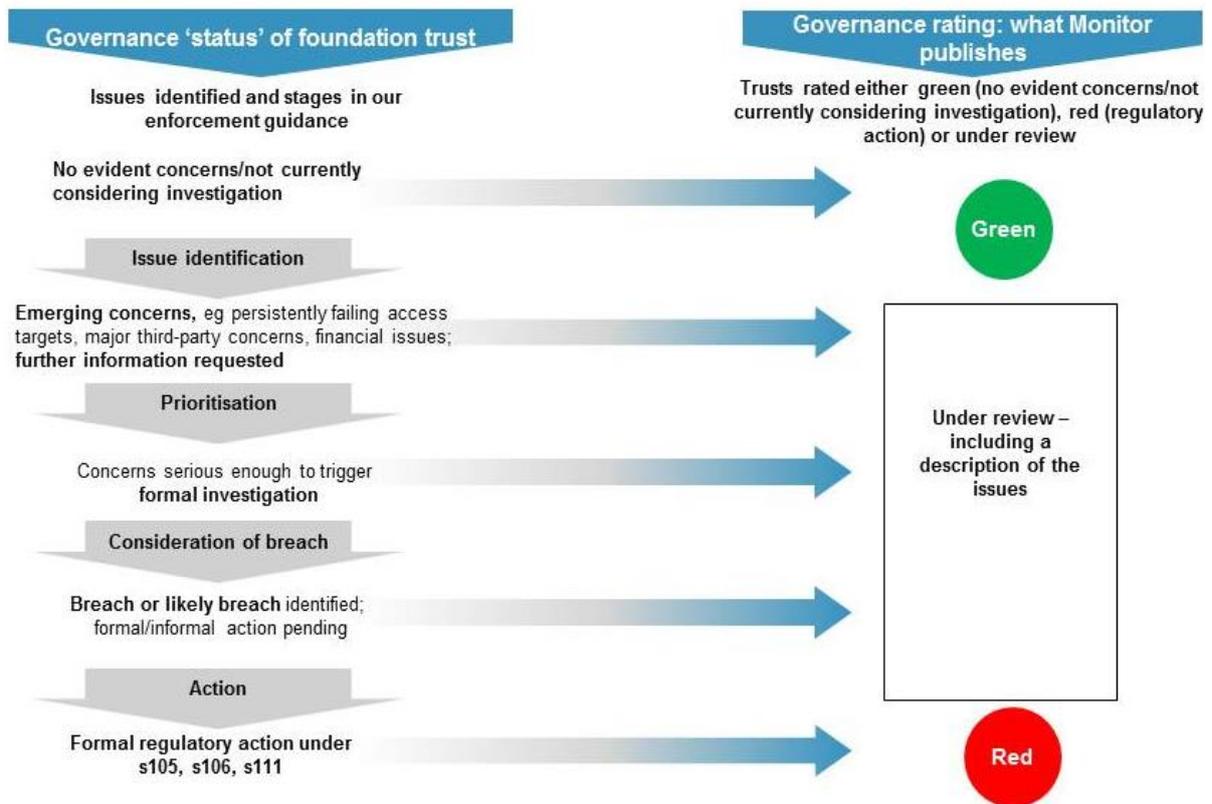
The governance rating assigned to an NHS foundation trust reflects Monitor's views of the strength of its governance (see Figure 6):

- **green rating:** no governance concern evident or no formal investigation being undertaken
- **under review:** potential material concerns with the trust's governance identified in one or more of the categories listed in Table 7 (requiring further information or formal investigation); we provide a description of the issue(s)
- **red rating:** enforcement action being taken.

In assigning an appropriate governance risk rating, we are informed by the:

- seriousness of the issue
- information we have concerning the situation
- effectiveness of the trust's initial response to the situation
- time-critical nature of the situation.

**Figure 6: Governance rating**



We generate this rating by considering the following information regarding the trust and whether it is indicative of a potential breach of the governance condition:

- performance against selected national access and outcomes standards
- outcomes of CQC inspections and assessments relating to the quality of care provided
- relevant information from third parties
- a selection of information chosen to reflect organisational health
- degree of financial sustainability risk and other aspects of risk relating to financial governance and efficiency
- any other relevant information.

We may require additional information from the trust. Depending on our assessment, we may decide to investigate formally and/or address the issue through our enforcement powers (see Chapter 5 and our [enforcement guidance](#)).

### **Performance against national access and outcomes standards**

Monitor expects NHS foundation trusts to establish and effectively implement systems and processes to ensure they can meet national standards for access to

healthcare services. We consider performance against a number of these standards in our assessment of the overall governance of a trust. We also assess trusts' ability to meet certain requirements of the NHS outcomes framework; Appendix A gives more information on the metrics concerned.

Material underperformance in the short term or ongoing (ie consecutive) underperformance against these access and outcomes requirements, may reflect a governance concern and warrant our consideration of further investigation.

### **Care Quality Commission inspections and judgements**

The licence requires NHS foundation trusts to have systems in place to deliver care of sufficient quality to patients. Where CQC issues a warning notice or takes other enforcement action, we are highly likely to investigate further and to consider whether a trust is, or will be, in breach of its licence. We will also consider whether CQC judgements in other relevant areas, such as the fit and proper persons requirements and the duty of candour contained in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, could be relevant to NHS foundation trusts complying with their governance condition.

### **Third-party information**

Monitor also considers information from third parties, either supplied directly or via the NHS foundation trust (see Section 2.4). While our initial response is likely to be a request for further information from the trust in question or others, where appropriate we may investigate formally (see Chapter 5) and consider whether an NHS foundation trust is, or will be, in breach of its licence. This is particularly likely where the information reflects similar or relevant concerns to those from other sources and/or is relevant to the governance of matters related to patient care.

### **Organisational health indicators**

It is not Monitor's role to assess directly the quality of care at an NHS foundation trust. However, it is our role to consider whether there is effective quality governance. Monitor uses a limited set of indicators to identify whether there are any relevant potential patient or workforce concerns at a trust. Table 7 lists the indicators that can raise governance concerns (presented by category).

It is unlikely that we would take regulatory action based on performance against these organisational health indicators alone. We typically use this information in three ways:

- during monitoring: to corroborate and add weight to other governance concerns (eg ongoing breaches of national targets)
- during an investigation: to help diagnose causes of poor performance (including identifying potential cultural issues)

- during an investigation/once a trust has been found to be in breach of its licence: as evidence that could be relevant to the assessment of our confidence in a trust's ability to turn around performance.

**Table 7: Indicators of governance concerns**

Category	Metrics	Governance concern triggered by.....
CQC concerns	<ul style="list-style-type: none"> <li>• Outcomes of CQC inspections and assessments</li> </ul>	<ul style="list-style-type: none"> <li>• CQC warning notice</li> <li>• changes to registration conditions</li> <li>• civil and/or criminal action initiated</li> </ul>
Access and outcomes metrics	<p>For <b>acute trusts</b>, metrics including:</p> <ul style="list-style-type: none"> <li>• RTT within 18 weeks</li> <li>• A&amp;E waits (4 hours)</li> <li>• Cancer waits (62 days)</li> <li>• C. difficile (national target)</li> </ul> <p>For <b>ambulance trusts</b>:</p> <ul style="list-style-type: none"> <li>• Category A response time</li> </ul> <p>For <b>mental health trusts</b>, metrics including:</p> <ul style="list-style-type: none"> <li>• CPA follow-up, EIP and IAPT</li> <li>• tracking accommodation/employment status (data completeness only)</li> </ul> <p>For <b>providers of community services</b>:</p> <ul style="list-style-type: none"> <li>• data completeness against selected elements of the Community Information Data Set</li> </ul>	<ul style="list-style-type: none"> <li>• breach of a single metric in three consecutive quarters or four or more metrics breached in a single quarter</li> <li>• breaching predetermined annual C. difficile threshold (either three quarters' breach of the year-to-date threshold or breaching the full-year threshold at any time in the year)</li> <li>• breaching the A&amp;E waiting times target in two quarters of any four-quarter period and in any additional quarter over the subsequent three quarters</li> </ul>
Third-party reports	<ul style="list-style-type: none"> <li>• ad hoc reports from the General Medical Council, the Ombudsman, commissioners, Healthwatch England, auditor reports, Health &amp; Safety Executive, patient groups, complaints, whistleblowers, medical Royal Colleges</li> </ul>	<ul style="list-style-type: none"> <li>• judgement based on the severity and frequency of reports</li> </ul>

Category	Metrics	Governance concern triggered by....
Quality governance indicators	<ul style="list-style-type: none"> <li>• patient metrics, eg: <ul style="list-style-type: none"> <li>○ patient satisfaction</li> </ul> </li> <li>• staff metrics, eg: <ul style="list-style-type: none"> <li>○ high executive team turnover</li> <li>○ satisfaction</li> <li>○ sickness/absence rate</li> <li>○ proportion of temporary staff</li> <li>○ staff turnover</li> </ul> </li> <li>• aggressive cost reduction plans</li> </ul>	<ul style="list-style-type: none"> <li>• material reductions in satisfaction or increases in sickness or turnover rates</li> <li>• material increases in proportion of temporary staff</li> <li>• cost reductions of &gt;5% in any given year</li> </ul>
Financial risk and efficiency	<ul style="list-style-type: none"> <li>• financial sustainability risk rating</li> <li>• inadequate planning processes</li> <li>• value for money measure</li> </ul>	<ul style="list-style-type: none"> <li>• financial sustainability risk rating indicating financial issues arising as a result of governance</li> <li>• inefficient/uneconomical spend compared to published benchmarks</li> </ul>

\*That is, a service performance score as per the metrics in Appendix A.

CPA, care performance approach; EIP, early intervention in psychosis; IAPT, improving access to psychological therapies.

We consider trends in these indicators at individual organisations, and where negative trends suggest potential issues (eg sudden increases in staff absenteeism), we consider if further information is necessary to assess (1) whether there may be issues with the quality governance at the trust and (2) to what extent the trust's board is aware of and addressing the issue. Our [enforcement guidance](#) contains further information on how we prioritise investigation and enforcement.

### **Financial risk, delivering value for money and aspects of financial governance**

Monitor considers that well-governed NHS foundation trusts will not only remain solvent (see Chapter 2) but will also demonstrate financial efficiency and robust financial planning and decision-making processes. Where we identify a material risk to a trust's financial sustainability, overall efficiency or overall compliance with the CoS licence conditions, we consider whether this may also reflect a governance issue.

When we assess trusts' forward plans, reforecasts and proposed transactions for any financial risk, we may also assess the governance underpinning the plans by, for example:

- checking if the approach to planning and the major assumptions in the forward plan are reasonable, eg looking at overall quality of the plan and plans for stress testing against different scenarios; comparison with past performance; appropriate reference to other NHS foundation trusts and relevant national guidance
- considering how close the NHS foundation trust's performance was to its plan in the previous year. We also assess the scale of any variance between key elements of the plan and the previous year's actual figures to test the credibility of the projections
- assessing the implications of poor planning for financial viability during the year.

Where we judge a trust's forward plans, reforecasts or transactions indicate the trust may not be taking sufficient steps to ensure compliance with the licence, we may initiate further investigation into its governance, particularly regarding planning and leadership.

### **Assessing value for money**

We may investigate if there is sufficient evidence to suggest inefficient and/or uneconomical spending at a trust. Such spending may indicate that a trust is failing to operate effective systems and/or processes (1) for financial management and control and (2) to ensure it operates economically, efficiently and effectively. Such evidence would include information available from published national benchmarks and we will notify the sector when appropriate benchmarks become available nationally. We may also look at whether a trust is adhering to good practice with respect to delivering value for money, for instance regarding agency and management consultant spend. In the absence of appropriate benchmarks we may still consider investigating a trust if there is material evidence to suggest a trust is delivering poor value for money.

### **4.3. Other information used to inform the governance rating**

Consideration of other information relevant to our governance oversight that becomes available during the year (board statements, forward plans and governance reviews) may lead to adjustment of the assigned governance rating if it raises governance concerns.

### **Corporate governance statement**

Under their governance condition NHS foundation trusts submit a corporate governance statement (see Appendix F) within three months of the end of each financial year. The governance condition requires boards to confirm:

- compliance with the governance condition at the date of the statement

- compliance with the governance condition for the current financial year, specifying (1) any risks to compliance and (2) any actions proposed to manage such risks.

Where the corporate governance statement indicates risks to compliance with the governance condition, we consider whether any actions or other assurances are required at the time of the statement or whether it is more appropriate to maintain a watching brief.

### **Annual governance statement**

NHS foundation trusts also publish an annual governance statement<sup>20</sup> in their annual reports, which includes reference to quality governance. The annual report should also include a statement that the board has conducted a review of the effectiveness of the trust's system for internal controls.

Where the annual governance statement indicates risks to compliance with the governance condition, we consider whether any actions or other assurances are required at the time of the statement or whether it is more appropriate to maintain a watching brief.

### **NHS foundation trust forward plans**

Under their governance condition, NHS foundation trusts are required to maintain effective systems of financial decision-making, management and control. Should our review of an NHS foundation trust's forward plan or other forward-looking information submitted as part of the monitoring requirements indicate concerns for the trust's financial sustainability, governance or compliance with any other aspect of the licence, we may ask for additional information or open a formal investigation, with our concerns reflected in the governance rating.

### **Regular governance reviews**

As described in Chapter 2, we recommend that NHS foundation trusts commission in-depth and independent reviews of their governance, ideally every three years. Their primary purpose is to provide assurance that governance remains robust. However, where a review identifies material governance concerns, we consider the trust's response to the review and what, if any, steps we need to take.

We see these reviews primarily as an opportunity to develop the sector's processes for building governance assurance. Provided they cover the areas described in Chapter 2, trusts are free to set the scope of the reviews they commission.

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<sup>20</sup> Refer to the most recent *NHS foundation trust annual reporting manual*.

NHS foundation trusts should report the findings of these reviews, and any response to them, to Monitor within 60 days of their submission to trust boards. Where we are made aware of these findings earlier and they are such that we consider it appropriate, we may take action sooner (see Chapter 5 and our [enforcement guidance](#)). Appendix B gives further details of the well-led framework for governance reviews.

#### **4.4. Ad hoc/triggered reviews of governance**

Should Monitor's oversight of governance indicate a material governance concern, we may request the trust's board to commission an immediate review of the issues behind this concern as a preliminary to or part of a formal investigation. Where the review identifies a potential breach of the governance condition, we may investigate further and possibly take enforcement action (see Chapter 5).

## 5. Investigation

**Our enforcement guidance should be read alongside this chapter.**

### 5.1. Introduction

The risk assessment processes outlined in the earlier chapters are designed to identify situations where an NHS foundation trust is, or is at risk of, failing to comply with the CoS or governance licence conditions.

This chapter sets out the principles and processes we apply once the RAF identifies a breach or potential breach of the licence in these areas.

Our [enforcement guidance](#) describes the powers available to us where we identify that a licence holder is, or is at risk of, breaching the licence and the process we follow to determine what regulatory approach to take.

### 5.2. Initial assessment and prioritisation

On identifying a concern at a licence holder, we consider:

- the context and circumstances of the potential breach
- the information already available from in-year monitoring
- any other information readily available from the trust and third parties.

Following this initial assessment, we consider if there are grounds to investigate if a breach may have occurred or may occur. The purposes of any subsequent investigation are to:

- determine the scale and scope of any breach
- establish the appropriate action, if any, to be taken, including enforcement action.

#### **Prioritisation**

As with any of our enforcement decisions, in deciding whether to investigate a potential breach we consider our prioritisation criteria:

- likely benefit (direct and indirect) to healthcare users
- impact on patients and the provision of healthcare
- ultimate scale and scope of the breach
- resources required to investigate and address the breach in full.

### 5.3. Investigation process

The investigation process is designed to provide evidence of a breach or a risk of a breach of the licence and, if found, to inform our regulatory response. The process allows us to find out, for example:

- the financial viability of the licence holder where there is a CoS licence condition concern
- for NHS foundation trusts, the quality of governance where an issue concerning compliance with the governance licence condition has been identified
- whether the licence holder has the capability and resources to return to compliance with the licence, or make good the effect of a breach
- the impact of any breach on other parties
- whether we need to use our formal enforcement powers or whether other forms of engagement are appropriate.

### 5.4. Monitor's response

Once we have identified a potential breach and launched an investigation, we are likely to require additional information to understand the nature of the issue, the licence holder's plans to address it and whether or not these plans can be successfully implemented. We may gather this information through a number of means, including:

- meetings with the licence holder
- requests for additional information from the licence holder
- where relevant, seeking the views of, or information from, appropriate third parties.

We may also ask the licence holder to take action, including:

- preparing, presenting and committing to deliver a plan to address the breach
- commissioning an independent report into the causes of the potential breach
- commissioning external advice to address the issue.

### **To foundation trusts in financial distress**

Where a foundation trust providing CRS is in financial distress, we may require it to:

- make information available to commissioners

- work with parties appointed by Monitor to address the financial issues
- generally co-operate with Monitor.

We may also request the board to commission an independent report. This may:

- investigate further the matters indicating a risk to CoS
- consider the monthly financial profile of the licence holder and key risks and sensitivities
- define a set of monthly measures that Monitor can use to assess the licence holder's return to financial stability
- assess the licence holder's capability to deliver a recovery plan.

### **To NHS foundation trusts potentially in breach of their governance condition**

Where we identify a potential breach by an NHS foundation trust of either the governance condition or any relevant condition of its licence resulting from its governance, we may require the trust to:

- further investigate the matters indicating a potential breach
- draw up a recovery plan addressing any potential breach, including an analysis of key risks and sensitivities
- agree measures of progress in addressing the issue
- consider management and organisational capability and any other factors related to addressing the issue.

### **5.5. Consideration and use of formal enforcement powers**

We work with licence holders deemed as potentially in breach of their licence to gather additional information and assess what is needed to ensure the issues are addressed swiftly and appropriately.

Our [enforcement guidance](#) gives more information on Monitor's formal powers of enforcement and our general approach to prioritising and deciding on regulatory action.

## Appendix A: Access targets and outcomes objectives

Monitor uses a limited set of national measures of access and outcome in our assessment of governance at NHS foundation trusts. These cover acute, mental health, community and ambulance activities. We use performance against these indicators to detect potential governance issues (see Table 7).

NHS foundation trusts failing to meet at least four indicator targets at any given time, or failing the same target in three consecutive quarters,<sup>21</sup> trigger a governance concern, potentially leading to investigation and enforcement action.

Except where otherwise stated, any trust commissioned to provide services will be assessed against the relevant governance indicators associated with those services.

Table A1 lists the indicators and their thresholds. Unless stated otherwise in the supporting notes, these are monitored on a quarterly basis.

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<sup>21</sup> For A&E only, failure to meet the target in any two quarters over a 12-month period and then failure in the subsequent 9-month period or the full year counts as a breach.

**Table A1: Indicators and their thresholds**

Indicator	Threshold (A)	Weighting(B)	Monitoring period	
1	Maximum time of 18 weeks from point of referral to treatment (RTT) in aggregate – patients on an incomplete pathway (C)	92%	1.0	Quarterly
2	A&E: maximum waiting time of four hours from arrival to admission/transfer/discharge (D)	95%	1.0	Quarterly
3	All cancers: 62-day wait for first treatment (E) from: urgent GP referral for suspected cancer NHS Cancer Screening Service referral	85% 90%	1.0	Quarterly
4	All cancers: 31-day wait for second or subsequent treatment (F), comprising: surgery anti-cancer drug treatments radiotherapy	94% 98% 94%	1.0	Quarterly
5	All cancers: 31-day wait from diagnosis to first treatment (G)	96%	1.0	Quarterly
6	Cancer: two-week wait from referral to date first seen (H), comprising: all urgent referrals (cancer suspected) for symptomatic breast patients (cancer not initially suspected)	93% 93%	1.0	Quarterly
7	Care programme approach (CPA) patients (I), comprising: receiving follow-up contact within seven days of discharge having formal review within 12 months	95% 95%	1.0	Quarterly
8	Admissions to inpatient services had access to crisis resolution/home treatment teams (J)	95%	1.0	Quarterly
9	Meeting commitment to serve new psychosis cases by early intervention teams (K)	95%	1.0	Quarterly

10	Category A call – emergency response within eight minutes (L), comprising: Red 1 calls Red 2 calls	75% 75%	1.0 1.0	Quarterly
11	Category A calls – ambulance vehicle arrives within 19 minutes (L)	95%	1.0	Quarterly
12	Early intervention in psychosis (EIP): people experiencing a first episode of psychosis treated with a NICE-approved care package within two weeks of referral (M)	50%	1.0	Quarterly
13	Improving access to psychological therapies (IAPT) (N): people with common mental health conditions referred to the IAPT programme will be treated within 6 weeks of referral people with common mental health conditions referred to the IAPT programme will be treated within 18 weeks of referral	75% 95%	1.0 1.0	Quarterly
14	C. difficile – meeting the C. difficile objective (O)	de minimis applies	1.0	Quarterly
15	Minimising mental health delayed transfers of care (P)	≤7.5%	1.0	Quarterly
16	Mental health data completeness: identifiers (Q)	97%	1.0	Quarterly
17	Mental health data completeness: outcomes for patients on CPA (R)	50%	1.0	Quarterly
18	Certification against compliance with requirements regarding access to healthcare for people with a learning disability (S)	N/A	1.0	Quarterly
19	Data completeness: community services (T), comprising: RTT information referral information treatment activity information	50% 50% 50%	1.0	Quarterly

## Notes

- A. Monitor will not use a general rounding principle when considering compliance with these targets and standards, eg a performance of 94.5% is considered as failing to achieve a 95% target. However, exceptional cases may be considered on an individual basis, taking into account factors such as low activity or thresholds that have little or no tolerance against the target, eg those set between 99% and 100%.

Unless otherwise specified, indicators have been sourced from publicly available definitions in the [Mandate](#), the [NHS Outcomes Framework](#) and [NHS Constitution](#).

- B. Where NHS foundation trusts breach given target(s), or certify breach(es), we use the sum of each metric's weighting to calculate a **service performance score**. **A score of  $\geq 4.0$  represents a governance concern**. Repeated breaches of a target also represents a governance concern (see Table A2).

Where targets comprise multiple thresholds, each threshold must be individually met to avoid incurring a score.

- C. **18-week referral to treatment:** performance is measured on an aggregate (rather than specialty) basis and NHS foundation trusts are required to meet the threshold on a monthly basis. Consequently, failure in one month is considered

to be a failure for the quarter in which that month falls for the purposes of the RAF. Failure in any month of a quarter following two quarters' failure of the same measure represents a third consecutive quarter failure and should be reported via the exception reporting process.

This applies to consultant-led incomplete pathways. The measures apply to acute patients whether in an acute or community setting. Where an NHS foundation trust with acute facilities acquires a community hospital, their combined performance is assessed. Only activity commissioned by English commissioners is included in data submitted to Monitor.

- D. **A&E four-hour wait:** waiting time is assessed on a provider basis, aggregated across all sites: no activity from off-site partner organisations should be included. The four-hour waiting time indicator applies to minor injury units/walk-in centres.
- E. **62-day wait for first treatment (all cancers):** measured from day of receipt of referral, including from screening services and other consultants, to treatment start date. **Failure against either threshold represents a failure against the overall target.** The target does not apply to trusts with five or fewer cases in a quarter. Monitor does not consider there to be a breach where trusts fail individual cancer

thresholds but only report a single patient breach over the quarter.<sup>22</sup> This target applies to any community providers providing the specific cancer treatment pathways.

National guidance states that where patients are referred from one provider to another, breaches of this target are shared 50:50. Breaches may be reallocated in full back to the referring organisation(s) provided Monitor receives evidence of written agreement to do so between the relevant providers (signed by both chief executives) at the time the NHS foundation trust makes its quarterly declaration to Monitor.

In the absence of any locally agreed contractual arrangements, Monitor encourages trusts to work with other providers to reach a local system-wide agreement on the allocation of cancer target breaches to ensure patients are treated in a timely manner. Once an agreement has been reached, Monitor will consider applying the terms of the agreement to the foundation trusts party to the arrangement.

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<sup>22</sup> For example, if a trust has 10 cancer (surgery) patients in a quarter and one breaches the waiting time target (scoring 90% vs the 94% threshold), Monitor generally does not consider this to be a breach. But if a trust has 20 patients and two breach the target (failing the target with more than one breach), Monitor generally considers this to be a breach of the target.

- F. **31-day wait for second/subsequent treatment (all cancers):** measured from cancer treatment period start date to treatment start date. **Failure against any threshold represents a failure against the overall target.** The target does not apply to trusts with five or fewer cases in a quarter. Monitor does not consider there to be a breach where trusts fail individual cancer thresholds but only report a single patient breach over the quarter.<sup>22</sup> This target applies to any community provider providing the specific cancer treatment pathways.
- G. **31-day wait from diagnosis to first treatment (all cancers):** measured from the date of the decision to treat to first definitive treatment. The target does not apply to trusts with five or fewer cases in a quarter. Monitor does not consider there to be a breach where trusts fail individual cancer thresholds but only report a single patient breach over the quarter.<sup>22</sup> This target applies to any community providers providing the specific cancer treatment pathways.
- H. **Two-week wait for cancer referral to date first seen:** measured from day of receipt of referral – existing standard (includes referrals from general dental practitioners and any primary care professional). **Failure against either threshold represents a failure against the overall target.** The target does not apply to trusts with five or fewer

cases in a quarter. Monitor does not consider there to be a breach where trusts fail individual cancer thresholds but only report a single patient breach over the quarter. This target applies to any community providers providing the specific cancer treatment pathways.

I. **Care programme approach (CPA) patients: failure against either threshold represents a failure against the overall target.**

- Seven-day follow-up:

**Numerator:** the number of people under adult mental illness specialties on CPA who were followed up (either with face-to-face or phone discussion) within seven days of discharge from psychiatric inpatient care.

**Denominator:** the total number of people under adult mental illness specialties on CPA who were discharged from psychiatric inpatient care.

All patients discharged to their place of residence, care home, residential accommodation or non-psychiatric care must be followed up within seven days of discharge. All efforts must be made to follow up the patient. It is the responsibility of the trust that discharged the patient to provide follow-up treatment. Links need to be established with the receiving institution if a patient is discharged to, for example, a care home, to enable follow-up. However, if the

patient is transferred to another psychiatric unit to continue psychiatric care, then the responsibility lies with the receiving trust to follow up the patient after discharge. Where a patient has been transferred to prison, contact should be made via the prison in-reach team.

Exemptions from both the numerator and the denominator of the indicator include:

- patients who die within seven days of discharge
- where legal precedence has forced the removal of a patient from the country
- patients discharged to another NHS psychiatric inpatient ward.

Guidance on what should and should not be counted when calculating the achievement of this target can be found on Unify2.<sup>23</sup>

- For 12-month review (from Mental Health Learning Disability Data Set (MHLDDS)):

**Numerator:** the number of adults in the denominator who have had at least one formal review in the last 12 months.

**Denominator:** the total number of adults who have received

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<sup>23</sup> Unify2 is the system for reporting and sharing NHS and social care performance information.

secondary mental health services and who were on CPA at the end of the reported period.

J. **Crisis resolution/home treatment teams:** this indicator applies only to admissions to the foundation trust's mental health psychiatric inpatient care. The following cases can be excluded:

- planned admissions for psychiatric care from specialist units
- internal transfers of service users between wards in a trust and transfers from other trusts
- patients recalled on community treatment orders
- patients on leave under Section 17 of the Mental Health Act 1983.

The indicator applies to users of working age (16 to 65) only, unless otherwise contracted. This includes Community and Mental Health Services (CAMHS) clients only where they have been admitted to adult wards.

An admission has been 'gate-kept' by a crisis resolution team if it assessed the service user before admission and if it was involved in the decision-making process that resulted in admission.

For full details of the features of gate-keeping, please see *Guidance statement on fidelity and best*

*practice for crisis services* issued by DH.<sup>24</sup> As set out in this guidance, the crisis resolution home treatment team should:

- provide a mobile 24-hour, seven days a week response to requests for assessments
- be actively involved in all requests for admission: for the avoidance of doubt, 'actively involved' requires face-to-face contact unless it can be demonstrated that this is not appropriate or possible. For each case where this contact is deemed inappropriate, a declaration that it is not the most appropriate action from a clinical perspective is required
- be notified of all pending Mental Health Act assessments
- assess all these cases before admission
- be central to the decision-making process in conjunction with the rest of the multidisciplinary team.

K. **Early intervention for new cases of psychosis:** quarterly performance against commissioner contract. The threshold represents a minimum level of performance against contract performance, rounded down. This indicator will

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<sup>24</sup> Available from: [webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/assetRoot/04/14/16/73/04141673.pdf](http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/assetRoot/04/14/16/73/04141673.pdf)

be superseded by the EIP access measure from April 2016.

L. **Ambulance emergency**

**response:** for patients with immediately life-threatening conditions.

The category A8 ambulance response time standard is formally subdivided into Red 1 and Red 2 calls to allow a faster response to those patients with time-critical conditions. Monitor differentiates between Red 1 and Red 2 A8 calls:

- Red 1 calls are the most time critical and cover cardiac arrest patients who are not breathing and do not have a pulse, and other severe conditions such as airway obstruction
- Red 2 calls are serious but less immediately time-critical and cover conditions such as stroke and fits.

Each category A8 call is assessed using the 75% threshold. **Failure against either threshold is considered a failure and scored accordingly.**

M. **Early intervention in psychosis (EIP).**

Foundation trusts will be required to report their performance to Monitor from Q4 2015/16 in accordance with the latest technical guidance published by NHS England and the Health and Social Care Information Centre (HSCIC) unless notified otherwise.

N. **Improving access to psychological therapies (IAPT):**

foundation trusts will be required to report their performance from Q3 2015/16 in accordance with the latest technical guidance published by NHS England and the HSCIC unless notified otherwise.

- O. **C. difficile:** applies to any inpatient facility with a centrally set C. difficile objective. Where an NHS foundation trust with existing acute facilities acquires a community hospital, the objective is an aggregate of the two organisations' separate objectives.

C. difficile cases should be reported regardless of whether or not a 'lapse of care' has been confirmed. Trusts should retrospectively revise any adjustments to numbers where lapse of care criteria are not met.

Where there is no objective (ie if a mental health NHS foundation trust without a C. difficile objective acquires a community provider without a C. difficile objective) we do not apply a C. difficile score to the NHS foundation trust's governance rating.

Monitor's annual de minimis limit for cases of C. difficile is set at 12. However, Monitor may consider scoring cases of <12 if Public Health England indicates multiple outbreaks.

Circumstances in which we score NHS foundation trusts for breaches of the C. difficile objective are:

Criterion	Will a score be applied?
Number of cases is less than or equal to the de minimis limit	No
Trust exceeds the de minimis limit but remains within the in-year trajectory <sup>25</sup> for the national objective	No
Trust exceeds both the de minimis limit and the in-year trajectory <sup>25</sup> for the national objective	Yes
Trust exceeds its national objective above the de minimis limit	Yes

Monitor assesses NHS foundation trusts for breaches of the C. difficile objective against their objectives at each quarter using a cumulative year-to-date trajectory as outlined in the table above.

Monitor considers it a matter of routine reporting for trusts to report any risk to achieving their targets, including those relating to infection control.

#### P. **Mental health delayed transfers of care:**

for full details of the changes to the CPA process, please see the implementation guidance *Refocusing the care programme approach* (DH).<sup>26</sup>

<sup>25</sup> Assessed at: 25% of the annual centrally-set objective at Q1; 50% at Q2; 75% at Q3; and 100% at Q4 (all rounded to the nearest whole number, with any ending in 0.5 rounded up). Monitor will not accept a trust's own internal phasing of its annual objective or that agreed with its commissioners.

<sup>26</sup> Available from: [webarchive.nationalarchives.gov.uk/20130](http://webarchive.nationalarchives.gov.uk/20130)

- For minimising mental health delayed transfers of care

**Numerator:** the number of non-acute patients (aged 18 and over on admission) per day under consultant and non-consultant led care whose transfer of care was delayed during the quarter. For example, one patient delayed for five days counts as five.

**Denominator:** the total number of occupied bed days (consultant- and non-consultant led) during the quarter.

Delayed transfers of care attributable to social care services are included.

#### Q. **Mental health identifiers:** patient identity data completeness metrics (from MHLDDS) to consist of:

- NHS number
- date of birth
- postcode (normal residence)
- current gender
- registered general medical practice organisation code
- commissioner organisation code.

[107105354/http://www.dh.gov.uk/prod\\_cons\\_um\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_083649.pdf](http://www.dh.gov.uk/prod_cons_um_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_083649.pdf)

**Numerator:** count of valid entries for each of the above data items.<sup>27</sup>

**Denominator:** total number of entries.

R. **Outcomes for patients on CPA** (from MHLDDS).<sup>28</sup>

- Employment status

**Numerator:** the number of adults in the denominator whose employment status is known at the time of their most recent assessment, formal review or other multidisciplinary care planning meeting in a financial year. Include only those whose assessments or reviews were carried out during the reference period. The reference period is the last 12 months working back from the end of the reported quarter.

**Denominator:** the total number of adults (18 to 69) who have received secondary mental health services and who were on the CPA at any point during the reported quarter.

- Accommodation status

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<sup>27</sup> For details of how data items are classified as valid, please refer to the data quality constructions available on the Information Centre's website:  
[www.ic.nhs.uk/services/mhmds/dq](http://www.ic.nhs.uk/services/mhmds/dq)

<sup>28</sup> Monitor is assessing the completeness of data to make assessments of employment and accommodation status. Thresholds in Table A1 reflect the minimum required completeness of data to assess performance against the indicators in question, not performance itself.

**Numerator:** the number of adults in the denominator whose accommodation status (ie settled or non-settled) is known at the time of their most recent assessment, formal review or other multidisciplinary care planning meeting. Include only those whose assessments or reviews were carried out during the reference period. The reference period is the last 12 months working back from the end of the reported quarter.

**Denominator:** the total number of adults (18 to 69) who have received secondary mental health services and who were on the CPA at any point during the reported quarter.

- Having a Health of the Nation Outcome Scales (HoNOS) assessment in the past 12 months

**Numerator:** the number of adults in the denominator who have had at least one HoNOS assessment in the past 12 months.

**Denominator:** the total number of adults who have received secondary mental health services and who were on the CPA at the end of the reference period.

S. **Learning disability access:** meeting the six criteria for meeting the needs of people with a learning disability, based on

recommendations in *Healthcare for all* (DH 2008).<sup>29</sup>

- Does the NHS foundation trust have a mechanism to identify and flag patients with learning disabilities and protocols that ensure pathways of care are reasonably adjusted to meet the health needs of these patients?
- Does the NHS foundation trust provide readily available and comprehensible information to patients with learning disabilities about the following criteria:
  - treatment options?
  - complaints procedures?
  - appointments?
- Does the NHS foundation trust have protocols to provide suitable support for family carers who support patients with learning disabilities?
- Does the NHS foundation trust have protocols to routinely include training on providing healthcare to patients with learning disabilities for all staff?
- Does the NHS foundation trust have protocols to encourage representation of people with learning disabilities and their family carers?

- Does the NHS foundation trust have protocols to regularly audit its practices for patients with learning disabilities and to demonstrate the findings in routine public reports?

NHS foundation trust boards are required to certify that their trusts meet the above requirements at the annual plan stage and in each quarter. Failure to do so results in the application of the service performance score for this indicator.

#### T. **Community services data**

**completeness:** data completeness levels for trusts commissioned to provide community services, using Community Information Data Set (CIDS) definitions, to consist of:

- RTT times – consultant-led treatment in hospitals and allied healthcare professional-led treatments in the community
- community treatment activity – referrals
- community treatment activity – care contact activity.

**While failure against any threshold scores 1.0, the overall impact is capped at 1.0.** Failure of the same measure for three consecutive quarters results in a red rating.

**Numerator:** all data in the denominator actually captured by the trust electronically (not solely CIDS-specified systems).

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<sup>29</sup> Available from:  
[webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_106126.pdf](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_106126.pdf)

**Denominator:** all activity data required by CIDS.

For the avoidance of doubt about which services/activities are within the scope of CIDS collection and how data are collected, please note that:

- all community providers that receive community funding are required to capture and produce local extracts of CIDS data, as defined in the relevant CIDS Information Standards Notice (ISN)
- Monitor's indicators are relevant for any services that previously would have been commissioned under (and funded through) the Community Services Contract. Services previously funded through an acute/other contract will continue to be excluded
- trusts that submit CIDS data through the Secondary Uses Service (SUS) are also required to capture CIDS data.

**Table A2: Levels of systematic under-performance that trigger a potential governance concern**

Indicator	Driver of governance concern
<b>Meeting the C. difficile objective</b>	Has >12 cases in the year to date and: <ul style="list-style-type: none"> <li>breaches the cumulative year-to-date trajectory for three consecutive quarters or</li> <li>breaches its full-year objective* or</li> <li>reports important or significant outbreaks of C. difficile</li> </ul>
<b>Referral to treatment (RTT) waiting times</b>	Breaches:** <ul style="list-style-type: none"> <li>the incomplete pathway 18-week waiting time measure for a third consecutive quarter</li> </ul>
<b>A&amp;E indicator</b>	Fails to meet the A&E target twice in any two quarters over a 12-month period and fails the indicator in a quarter during the subsequent 9-month period or the full year
<b>Cancer waiting times</b>	Breaches: <ul style="list-style-type: none"> <li>the 31-day cancer waiting time target for third consecutive quarter or</li> <li>the 62-day cancer waiting time target for a third consecutive quarter</li> </ul>
<b>Ambulance response times</b>	Breaches: <ul style="list-style-type: none"> <li>category A8 call response time targets (Red 1 and Red 2) for a third consecutive quarter or</li> <li>category A19 call response time target for a third consecutive quarter</li> </ul>
<b>Community services data completeness</b>	Fails to maintain the threshold for data completeness for: <ul style="list-style-type: none"> <li>RTT information for a third consecutive quarter</li> <li>service referral information for a third consecutive quarter</li> <li>treatment activity information for a third consecutive quarter</li> </ul>
<b>Mental health access measures</b>	Breaches:*** <ul style="list-style-type: none"> <li>early intervention in psychosis for a third consecutive quarter</li> <li>IAPT for a third consecutive quarter</li> </ul>
<b>Any indicator</b>	Breaches the indicator for a third consecutive quarter

\* Consideration of investigation can occur as soon as the full-year breach is reported.

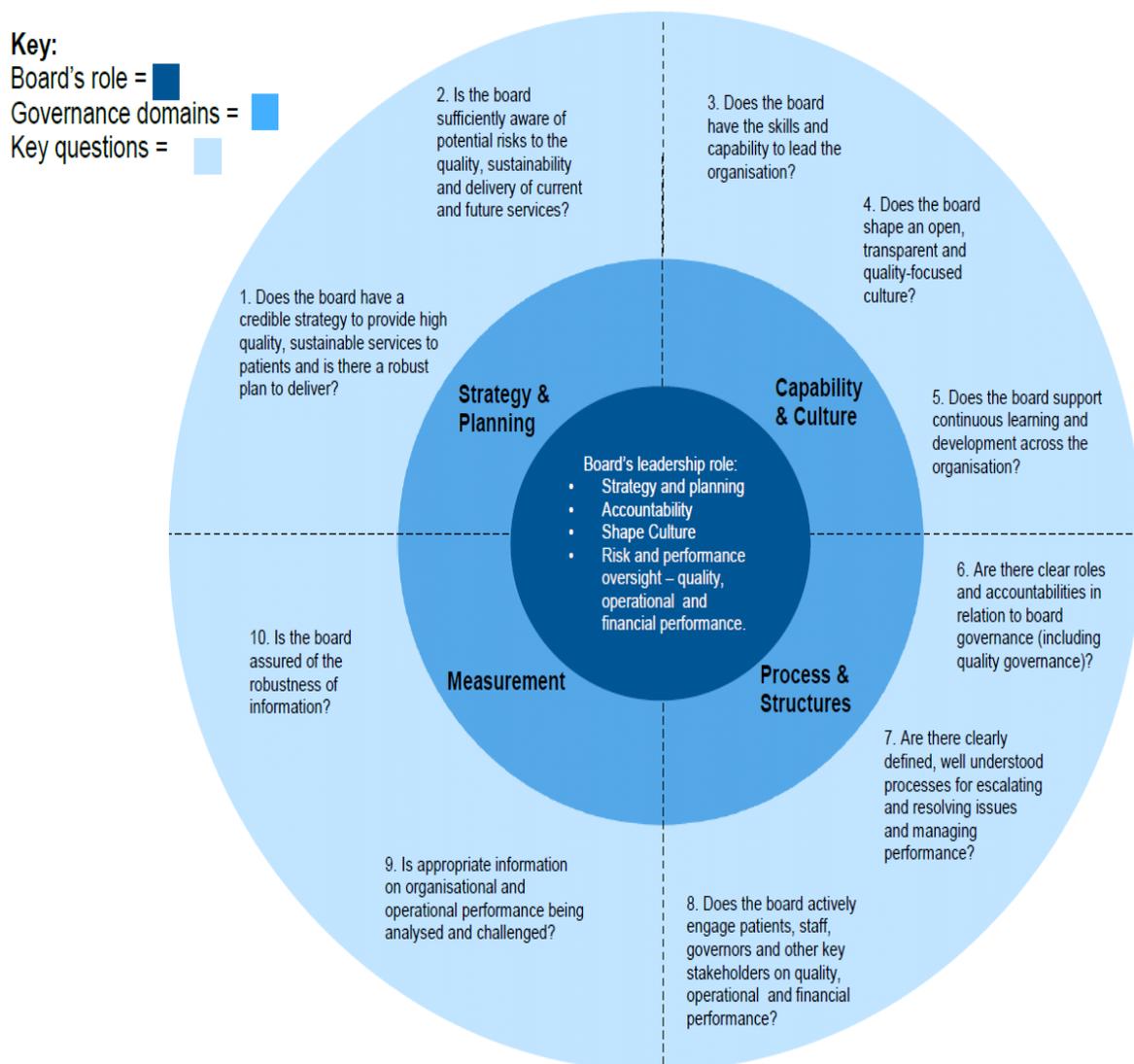
\*\* As the indicator must be met in each month during the quarter, trusts should report, by exception, any month in which they breach the RTT measure. Where trusts consequently report failures in the first or second months of a quarter, and have failed the measure in each of the previous two quarters, Monitor may consider whether or not to investigate the trust in advance of the end of the third quarter. This also applies where a trust fails the relevant measure in each year spanning any three quarters from 2012/13 to 2013/14.

\*\*\* From Q3 and Q4 2015, subject to NHS England monitoring processes in place.

## Appendix B: The well-led framework for governance reviews

Monitor has issued guidance on the well-led framework for governance reviews to support NHS foundation trusts gain assurance that they remain well led.

The **framework** represents a ‘core’ reference for NHS foundation trusts to follow in structuring reviews of their governance.<sup>30</sup> The depth and breadth of investigation can be shaped by the trust’s self-assessment and initial review at the start of the process. Where trusts choose to exclude core elements of the framework, they should tell us they are doing this and why, in line with a ‘comply or explain’ approach.



<sup>30</sup> Available from:  
[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/312994/Well\\_led\\_framework\\_questions\\_and\\_good\\_practice\\_examples\\_1\\_.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312994/Well_led_framework_questions_and_good_practice_examples_1_.pdf)

## Appendix C: NHS foundation trust transactions

As part of its overall assessment of NHS foundation trusts' compliance with the continuity of services and governance conditions of their licences, Monitor considers the impact of transactions involving these trusts. We take a proportionate approach, with our view of the risks involved in undertaking a transaction determining the degree of analysis and assurance required.

Transactions will be classed as 'small', 'material' or 'significant'. Our level of scrutiny will depend on these classifications.

Transactions that we consider 'significant' (as defined under 'Thresholds for reporting and detailed review' below) will be subject to a detailed review. Where a trust has incorporated its own definition of a significant transaction into its constitution, this may differ from our definition of 'significant'. Our definition applies for the purposes of determining whether we conduct a detailed review.

Our approach to transactions involving NHS foundation trusts is twofold.

### Statutory transactions

Under the 2006 Act, as amended by the 2012 Act, we have a statutory role in approving (where we are satisfied that trusts have taken the necessary preparatory steps):

- mergers between NHS foundation trusts or NHS foundation trusts and NHS trusts
- acquisitions by an NHS foundation trust of an NHS trust or another NHS foundation trust
- separations of NHS foundation trusts into two or more NHS foundation trusts
- dissolutions of NHS foundation trusts.

Trusts undertaking these transactions are required under the 2006 Act, as amended by the 2012 Act, to make a formal application (with accompanying documents) to Monitor. This will involve completing a number of statutory requirements (eg obtaining the approval of a majority of governors) as set out in Appendix E.

Appendix E clarifies what we consider are the necessary preparatory steps for a small, material or significant statutory transaction.

**NHS foundation trusts must follow the guidance set out in this appendix before they make a formal application to Monitor in order to satisfy us that they have completed all the preparatory steps required for formal approval of the transaction.**

## **Other transactions**

In addition to assessing statutory transactions, we will also assess other transactions to determine whether they are likely to represent a risk to a trust's compliance with the continuity of services or NHS foundation trust governance licence conditions.

Such transactions include:

- projects funded through private finance initiatives (PFIs)
- contracts to provide services
- material capital investments
- other mergers, acquisitions, investments or divestments
- joint ventures
- changes in indemnity arrangements that exceed the thresholds shown in Table A3
- other organisational forms initially developed as new care models.

Where we consider such a transaction to be significant according to the criteria set out under 'Thresholds for reporting and detailed review' below, we will conduct a detailed review to consider the risk involved in undertaking the transaction and communicate this in a letter to the trust board.

Where a transaction represents in our view a substantial level of risk to a trust's compliance with its continuity of services or governance licence conditions, we will consider whether we need to use our powers to mitigate that risk.

## **Engagement with Monitor**

If an NHS foundation trust's potential transaction meets any one of the criteria set out in the following section, which details the thresholds for reporting transactions to us and for a detailed review, the trust should report the transaction to Monitor. This section describes how we engage with trusts on all reportable transactions, and details how we engage with NHS foundation trusts planning mergers and acquisitions in particular.

A number of different strategic and/or operational changes made by NHS foundation trusts (including but not limited to transactions) may raise issues under the competition rules that apply to providers of NHS services. NHS foundation trusts should inform themselves at an early stage whether the proposed changes are likely to raise any issues under these rules as this will enable an informed decision to be

taken on how best to proceed. Further details on the types of competition issues that can arise and how Monitor can help trusts understand them can be found [here](#).<sup>31</sup>

### *Reportable transactions*

If a potential transaction, statutory or otherwise, will need to be reported to Monitor according to the criteria set out under 'Thresholds for reporting and detailed review' below, the trust should contact us as soon as the transaction becomes a significant likelihood to agree:

- whether the proposed transaction is 'significant' and will therefore require a detailed review by Monitor
- the likely timing of any detailed review and
- the scope of any detailed review.

Trusts that are considering an investment that may require approval from the DH or the Treasury (eg PFI investments or other investments that are novel, contentious or potentially repercussive for the public sector) for their planned investment should engage with us at an early stage (that is, as soon as they believe there is a significant likelihood that they will want to undertake the transaction).

### *Mergers and acquisitions*

We will work closely with trusts considering a merger or acquisition to help them navigate the relevant regulatory issues (including any implications of competition rules) by engaging at several points as a transaction develops.

This is to ensure the proposals work in the best interests of patients, from both good governance and competition perspectives.

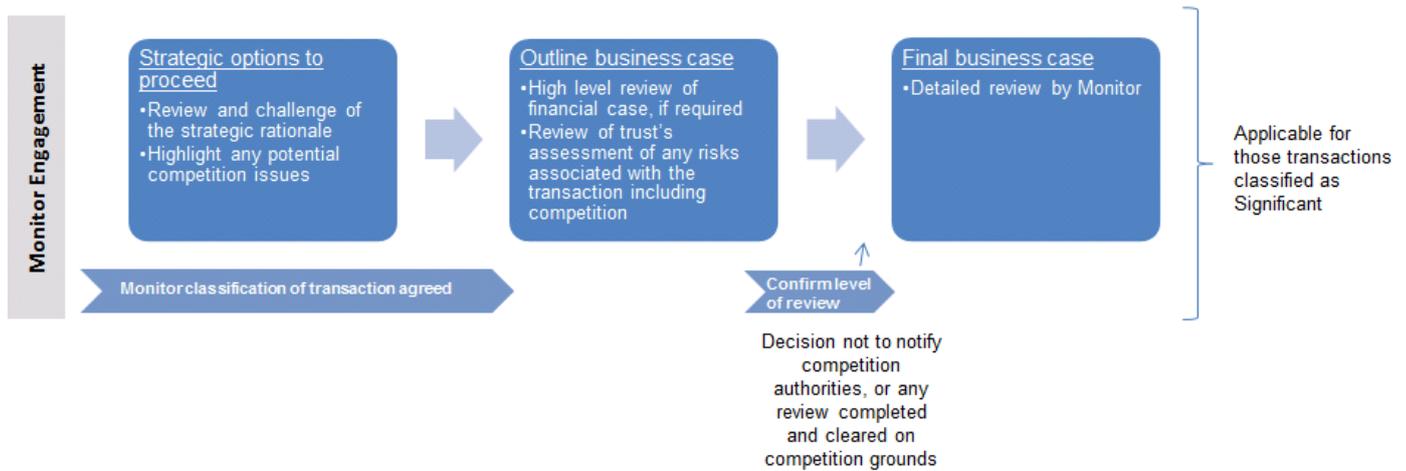
In line with our roles of assessing NHS foundation trusts' compliance with the continuity of services and governance licence conditions as well as supporting trusts in understanding any competition issues, we will review the trust's assessment of its strategic rationale for the transaction at an early stage. The level of work that we conduct will depend on our classification of the transaction. **NHS foundation trusts contemplating a merger or acquisition should therefore engage with us at an early stage** (that is, as soon as they believe there is a significant likelihood that they will want to undertake a transaction).

Figure A1 shows the anticipated points of engagement between Monitor and a trust during the planning process for a merger or acquisition. We then give further detail on each stage of engagement.

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<sup>31</sup> [www.monitor.gov.uk/regulating-health-care-providers-commissioners/co-operation-and-competition](http://www.monitor.gov.uk/regulating-health-care-providers-commissioners/co-operation-and-competition)

**Figure A1: Monitor and NHS foundation trust engagement for mergers and acquisitions**



### Stage 1: Strategic options to proceed

We would offer relatively informal support and advice at this stage, with two objectives:

- **To consider the robustness of the underlying strategy:** Our intention is not to approve the proposed strategy at this stage but to pose key questions that might include:
  - what challenges faced by the trust is the transaction strategy seeking to address?
  - what options other than this transaction were considered for addressing those challenges?
  - what was the basis for selecting the proposed (transaction) approach?

We will offer views on how robustly the trust has answered these questions, but it will be for the trust to decide how to proceed.

- **To highlight the type of competition issues that might arise:** At this stage we would also advise whether we believe the transaction might give rise to competition issues and, if so, what the trust should do to determine more precisely the nature and extent of those issues. We would also advise in general terms on how to assess relevant patient benefits.

We would also set out our likely transaction classification at this stage, where there is sufficient information to do so.

## **Stage 2: Review of outline business case**

Once a trust has developed an outline business case and identified its preferred option we may undertake a further review of the case, before the trust commits significant resources. This work would comprise:

- a review and challenge of the strategic rationale supporting the transaction and, potentially, a high-level review of the financial case if the transaction triggers the detailed review threshold set out below. The purpose here would be to identify any 'show stoppers' before significant resources have been committed
- a review of the trust's own assessment of any competition issues resulting from the proposed transaction, comparing these with our own assessment
- a preliminary review of the trust's approach to assessing relevant patient benefits, including the robustness of plans to realise those benefits, as well as commissioning intentions in the local area.

These discussions would conclude in a more formal meeting between Monitor and the trust board, after which we would send a letter to the trust setting out:

- any strategic business issues that we feel need further attention
- our view on whether the proposed transaction is likely to give rise to any competition issues and, if necessary, our suggestions on what work the trust needs to do to examine these potential issues
- our view as to what, if any, further work is needed to complete the analysis and presentation of relevant patient benefits.

It would be for the trust to decide whether or not to proceed with the proposed merger and whether or not to notify the Office of Fair Trading (OFT). Trusts are not required to notify the OFT of the proposed merger – it is for the trust to decide whether to do so. However, there are risks of not notifying a merger where it might give rise to competition issues as the OFT may call the merger in for review.

We would not normally start work on a detailed transaction review until the competition authorities have cleared the transaction (if required).

## **Stage 3: Monitor detailed review of final business case**

The scope of the detailed review (if required) will, where possible, be determined at Stage 1, the review of the strategic option to proceed, and refined at Stage 2, the review of the outline business case. The classification of the transaction will remain subject to there being no material changes in the risk profile of the transaction before it is completed. Further detail of the potential scope and output of a detailed review is set out below.

## Thresholds for reporting and detailed review

If a potential transaction meets any one of the criteria in Table A3, the NHS foundation trust should report it to Monitor.

**Table A3: Monitor reporting requirements**

Ratio	Description	Reporting requirements	
		Non-healthcare/ international	UK Healthcare
<b>Assets</b>	The gross assets* subject to the transaction, divided by the gross assets of the foundation trust	>5%	>10%
<b>Income</b>	The income attributable to the: <ul style="list-style-type: none"> <li>• assets or</li> <li>• contract</li> </ul> associated with the transaction, divided by the income of the foundation trust	>5%	>10%
<b>Consideration to total foundation trust capital</b>	The gross capital** or consideration associated with the transaction divided by the total capital*** of the foundation trust following completion or the effects on the total capital of the foundation trust resulting from a transaction	>5%	>10%

\* Gross assets are the total of fixed assets and current assets.

\*\* Gross capital equals the market value of the target's shares and debt securities, plus the excess of current liabilities over current assets.

\*\*\* Total capital of the foundation trust equals taxpayers' equity.

Capital investments may be made over a number of years, with revenue attributable to the investment potentially only achieved in future years. For calculation of the asset ratio, estimated capital spend is compared with audited asset values, and for the income ratio the full-year impact of projected revenue from the investment is compared with the projected foundation trust revenue in that year.

Where an NHS foundation trust chooses to end its membership of the NHS Litigation Authority's various schemes, including the Clinical Negligence Scheme for Trusts

(CNST), and enters into alternative indemnity arrangements that affect the capital (taxpayers' equity) on the trust's balance sheet, this may trigger a transaction review according to the thresholds set out in this section.

For any other transaction types, the data used for the transaction classification will be considered on a case-by-case basis. NHS foundation trusts should seek our guidance if there is any uncertainty.

Where there has been a material or significant transaction since the date of the last audited accounts (ie those accounts do not include that transaction), we consider the data used for the transaction classification on a case-by-case basis. NHS foundation trusts should seek our guidance if there is any uncertainty.

In the case of an acquisition where there has been a material change in the financial position of either the NHS foundation trust or the business being acquired since the date of its last accounts, and the ratio at that time is not considered representative of the likely contribution of the acquired business to the foundation trust, we may, following discussions with the foundation trust, choose to recalculate the ratios on a proforma basis using current or future year data.

In all cases we may, following discussions with the foundation trust, choose to recalculate the ratios using data that we reasonably consider to be a more appropriate measure of the relative size of the transaction.

Even where a proposed transaction does not trigger the reporting requirements set out above, boards are encouraged to take account of our best practice advice<sup>32</sup> when evaluating the processes they should undertake to ensure reputational and financial risks are fully understood and governance obligations are met.

#### *Threshold for detailed review*

Monitor's view of the risks inherent in a potential transaction will determine whether it is classified as 'small', 'material' or 'significant'.

Those transactions which do not meet the reporting requirements (see Table A3) are classified as 'small' transactions. If the small transaction is nevertheless a statutory transaction, a trust must make a formal application to Monitor and demonstrate that it has taken the necessary preparatory steps, as set out in Appendix E. In any other type of small transaction, we would not normally expect to be notified or otherwise involved.

All reportable transactions will be classified as either material or significant.

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[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/386708/MonitorTransactionsGuidance.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386708/MonitorTransactionsGuidance.pdf)

Once a transaction has been reported, we will seek to understand more about the risks associated with the transaction to determine its regulatory approach. Potential risks will include:

- the relative size of the transaction compared to the NHS foundation trust
- the leverage expected in the enlarged organisation following the transaction
- the degree of experience in the acquiring organisation of the services provided by the target (where relevant), or of any change in services following the investment
- the existing level of financial risk and quality risk in the target (where relevant)
- the existing level of financial risk and quality risk in the NHS foundation trust
- risks identified as part of our early engagement with the trust (where relevant), for instance poor options appraisal or a lack of strategic rationale.

A non-exhaustive list of examples of risk factors are set out in the below to provide trusts with an indication of what we may consider to be a major risk or otherwise.

Risk factor	Example of major risk	Example of other risk
Leverage	Capital servicing capacity of enlarged organisation is <1.75 (as defined in the RAF)	Capital servicing capacity of enlarged organisation is <2.5 (as defined in the RAF)
Acquirer's experience of services provided by target	A significant change in scope of activity of acquirer	A minor change in scope of activity of acquirer
Acquirer quality	Governance at the acquirer is rated 'red' or subject to narrative with a 'formal investigation' underway	Governance at the acquirer is subject to narrative description of some concerns
Acquirer financial	Financial sustainability risk rating $\leq 2$ in the acquirer	Financial sustainability risk rating of 2*/3 in the acquirer
Target quality	Target is rated 'inadequate' by CQC	Target is rated 'requires improvement' by CQC
Target financial	Target has significant current and/or historical deficits	Target has minor current and/or historical deficits

We look at each potential transaction on a case-by-case basis and may change our relative weighting of the risks outlined above if we consider this appropriate. Trusts should keep us informed of any change to the risk profile of the transaction. We may change our view of the classification based on this information.

Based on our assessment of the nature and scale of these risks, we will determine whether a detailed review is required and, if so, the scope of the detailed review. **If a**

## **detailed review is required, the transaction will be classified as ‘significant’.**

Those transactions which trigger the reporting requirements above but do not require a detailed review are classified as ‘material’ transactions.

We will decide to classify the transaction as significant and therefore requiring a detailed review according to whether the transaction meets one of the following criteria:

- a relative size of >40% in any of the tests set out in Table A3 will always lead to a detailed review
- a relative size of between 25% and 40% of the tests set out in Table A3 will lead to a detailed review where an additional risk factor has been identified by Monitor and is considered relevant
- a relative size of between 10% and 25% of the tests set out in Table A3 will lead to a detailed review where, in Monitor’s view, one or more major risk or more than one other risk has been identified by us and is considered relevant.

### **Material transactions – requirements**

Where a transaction is classified as material, Monitor will, as part of its overall assessment of financial and governance risk, request evidence in the form of a certification that the board has satisfied itself in a number of areas set out in Appendix D. In certain transactions we may require trusts to provide additional evidence to support their certification. The certification should be submitted to and agreed with us before the trust enters into any legally binding arrangements in relation to the transaction. In addition, within six months of the transaction occurring, the trust should make a revised corporate governance statement (see Appendix F) and send this to Monitor, with the exception of the statement concerning quality governance for which an appropriate timescale for compliance should be determined by the trust board and agreed with us.

If the board is not able to certify to Monitor that it is satisfied that the above matters have been addressed, or provide material on request to support the certification, it should explain why. We will consider this in assessing the risk associated with the transaction and whether additional assurance work is required.

### **Significant transactions – requirements**

Where a transaction is classified as significant, NHS foundation trusts must, in addition to the evidence requested for a material transaction, provide us with a greater degree of assurance regarding the risk to breach of the continuity of services or NHS foundation trust governance licence conditions. This will be by way of a detailed review, the majority of which will normally be conducted at Final Business Case stage. For a significant transaction NHS foundation trusts must prepare

financial plans in a suitable Monitor Long Term Financial Plan model and should contact [modelqueries@monitor.gov.uk](mailto:modelqueries@monitor.gov.uk) to confirm the most suitable model to use.

The purpose of the detailed review is to consider how the proposed transaction may affect the risk profile of the ongoing NHS foundation trust (or the new NHS foundation trust in the event of a merger).

We will perform detailed work in up to four areas, depending on the nature and risks of the proposed transaction:

- strategy
- transaction execution
- quality
- finance.

We will assess each of these areas using the key questions:

#### *Strategy*

1. Is the trust's overall strategy well reasoned and can the board demonstrate how the transaction supports its delivery?
2. Has there been a detailed options appraisal and is there a clear rationale for the option the trust has selected?
3. Does this rationale explain why it is the best option for patients, the trust and the local health economy?
4. Does the board have the capability, capacity and experience to deliver the trust's strategy?

#### *Transaction execution*

1. Does the board have the capability and capacity to minimise execution risks?
2. Is the board able to identify and quantify transaction risks appropriately (including risks associated with the competition rules, if any)? Is its approach to due diligence robust, and is there evidence that key risks have been recorded?
3. Has the board effectively mitigated the key risks and established effective processes for the continued management of these risks, post-transaction?
4. Is there a robust and comprehensive plan for delivery of the transaction, including integration and realisation of other benefits?
5. Is the integration plan sufficiently supported by clear lines of accountability,

governance processes, delivery milestones and dedicated resource?

6. Has the trust met all regulatory and legal requirements (including certification), and is it planning the transaction with reference to good practice guidance?

### *Quality*

1. Has the trust received an unqualified quality governance opinion in relation to the transaction (where relevant)?
2. Has the medical director provided certification to Monitor?
3. What is CQC's view of both trusts and the impact of the planned transaction?
4. Would the enlarged organisation trigger any governance concerns under the risk assessment framework?\*

### *Finance*

1. Is the trust's plan financially viable and sustainable, post-transaction?\*
2. Has the trust received an unqualified financial reporting procedures opinion (where relevant)?
3. Has the trust received an unqualified working capital opinion (where relevant)?

\*Post-investment adjustment.

**Note:** The trust board's ability to manage downside financial risk is assessed as part of Question 3 under 'transaction execution'. The key question for consideration is: **Can the board articulate future mitigation plans and demonstrate the capability to deliver these plans?**

### *Additional assurances*

We may, on a case-by-case basis, seek additional evidence concerning the assurance the board has received in relation to the transaction. This may include external reports and opinions from independent accountants or other experts on any or all of the following:

- post-transaction integration plans
- a working capital board memorandum prepared in relation to the transaction
- board memorandum on financial reporting procedures
- plans for applying appropriate quality governance arrangements across the new organisation.

The information that we request will take into account the specific risks of the proposed transaction. Lack of any or all of the information requested is likely to have a bearing on our view of the degree of risk the transaction represents.

We may also, on a case-by-case basis, ask trusts to provide Monitor with a letter of representation before Monitor's risk-rating decision. This letter will confirm that all relevant information has been provided to Monitor and will be signed by the chair on behalf of the whole trust board.

### **Transaction risk rating**

Small and material transactions are not risk rated by Monitor.

This rating is based on an aggregate of the risks identified under each of the four areas that could constitute a detailed review (see 'Significant transactions – requirements' section above), noting that some risks could by themselves be so significant that they drive the overall rating. Our assessment of risk will be based on a trust's adherence to Monitor's good practice guidance. The risk-rating definitions are set out below:

- green – no material concerns arising out of our detailed review
- amber – some significant issues arising which will require action by the trust to address and may require ongoing regulatory monitoring. However, issues are not so serious that the transaction ought to be stopped or deferred
- red – issues considered to be sufficiently serious to warrant deferring the transaction to allow time to restructure it (if possible) to address the risks involved. If this is not considered possible, the transaction ought to be stopped, through the use of regulatory powers if appropriate.

### **Investment adjustments**

In order not to discourage NHS foundation trusts from undertaking transactions with short-term negative implications for Monitor's risk ratings, NHS foundation trusts may apply for investment adjustments before we assign the transaction a risk rating.

An investment adjustment will be considered by Monitor on a case-by-case basis and will only be granted in the following circumstances:

- written application is made by the NHS foundation trust to us, requesting an investment adjustment and providing supporting information
- the relevant transaction is a material or significant transaction.

### *Financial sustainability risk-rating adjustments*

For financial sustainability risk-rating adjustments, trusts are required to provide

evidence that:

- risks and potential rewards, and their likely timing, are demonstrated in accordance with Monitor's transaction guidance
- the NHS foundation trust's plan supporting the investment identifies the potential risk-adjusted costs and returns over the period of the investment.

In assessing a potential investment adjustment, we may require a presentation from the NHS foundation trust setting out the basis on which it considers it appropriate, including detailed analysis of cash flows and associated risks.

#### *Governance rating adjustments*

Trusts seeking such an adjustment based on a revised performance threshold should, in the first instance, submit to Monitor, alongside the standard requirements for a transaction:

- a proposed threshold trajectory for each governance indicator for the acquired business by quarter, showing how the trust will return to the target threshold within an appropriate timeframe agreed with us
- a proposed threshold trajectory for each indicator against which the trust should be scored across the combined business, rather than separately
- a rationale for the thresholds above.

We will investigate the rationale before agreeing to any trajectory.

Monitor will generally not provide a transaction adjustment related to risks triggered by CQC concerns.

#### **Transactions involving NHS foundation trusts meeting investigation triggers**

We may vary our approach to calculating risk ratings for transactions where there is a pre-existing risk that the NHS foundation trust is in breach of its licence conditions.

Where an NHS foundation trust has met one of our investigation triggers, and we are currently considering whether to investigate formally, or are formally investigating that trust, we may:

- **for material transactions**, postpone submission of trust certifications concerning the transaction in question
- **for significant transactions**, postpone assigning a risk rating to the transaction until Monitor has determined whether the trust is, or is not, in breach of the governance or continuity of services conditions of its licence and whether regulatory action is necessary.

## **Transactions involving NHS foundation trusts in breach of the continuity of services or governance conditions of their licence**

Where an NHS foundation trust is in breach of the continuity of services or governance conditions of their licence, we may consider any material transaction as a significant transaction and consequently undertake a detailed review.

### **Aggregation of transactions in a 12-month period**

Transactions completed with the same counterparty during the 12 months before the date of the latest transaction may be aggregated with that transaction for the purposes of Monitor's reporting thresholds. We should be informed at an early stage of the latest transaction in such cases.

### **Joint ventures**

NHS foundation trusts entering into major joint ventures, including Academic Health Science Centres (AHSCs), that meet any of the triggers set out below are required:

- as part of the annual plan each year, to certify anticipated continued compliance with the requirements set out in Appendix G
- by exception, to notify Monitor where an NHS foundation trust ceases to comply with the requirements set out in Appendix G.

The relevant triggers are:

- Control, ie where a separate decision-making body has influence over the development and/or delivery of an NHS foundation trust's strategy. Where the separate decision-making body is a legal entity, influence would normally be defined as at least 20% ownership.
- Financial conditions – where an NHS foundation trust's:
  - assets within the vehicle are >10% of its total assets (per the most recent quarterly monitoring submission) or
  - share of income or expenditure from the partnership exceeds 10% of the foundation trust's total income or expenditure respectively in any full financial year.
- Legal arrangement, ie for 'accredited' AHSCs only, where an NHS foundation trust enters into a legal agreement establishing the legal arrangement of the partnership.

## Appendix D: Certification requirements

Where a potential transaction is deemed to be material, based on the thresholds in Table A3, Monitor will, as part of its overall assessment of financial risk and governance, request evidence that the board is satisfied that it has:

- considered a detailed options appraisal before deciding that the transaction delivers benefits for patients and the trust in delivering its strategy
- assured itself that a proposed transaction will meet the requirements of the choice and competition licence conditions
- conducted an appropriate level of financial, clinical and market due diligence relating to the proposed investment or divestment
- considered the implications of the proposed investment or divestment on the resulting entity's financial sustainability risk rating, having taken full account of reasonable downside sensitivities
- conducted appropriate inquiry about the probity of any partners involved in the proposed investment or divestment, taking into account the nature of the services provided and likely reputational risk
- conducted an appropriate assessment of the nature of services being undertaken as a result of the investment or divestment and any implications for reputational risk arising from these
- received appropriate external advice from independent professional advisers with relevant experience and qualifications
- taken into account the best practice advice in Monitor's transactions guidance<sup>33</sup> or commented by exception where this is not the case
- resolved any accounting issues relating to the investment or divestment and its proposed treatment
- addressed any legal issues, including those associated with the transfer of staff (either via an acquisition, divestment or fixed term contract)
- complied with any consultation requirements
- established the organisational and management capacity and skills to deliver the planned benefits of the proposed investment or divestment

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<sup>33</sup> Available from:  
[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/386708/MonitorTransactionsGuidance.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386708/MonitorTransactionsGuidance.pdf)

- involved senior clinicians at the appropriate level in the decision-making process and received confirmation from them that there are no material clinical concerns in proceeding with the investment or divestment, including consideration of the subsequent configuration of clinical services;
- in the case of a contract of a specified period, ensured appropriate legal protection in relation to staff, including on termination of the contract
- ensured relevant commercial risks are understood
- made provision for the transfer of all relevant assets and liabilities
- at the time of the acquisition, a corporate governance statement (see Appendix F) for the acquirer and
- at the time of the acquisition, a board statement that plans are in place to be able to make the corporate governance statement (see Appendix F) in the new organisation within six months, with the exception of the following statement concerning quality governance for which an appropriate timescale for compliance should be determined by the trust board and agreed with Monitor:

“The board is satisfied:

(f) that there is clear accountability for quality of care throughout [insert name] foundation trust including but not restricted to systems and/or processes for escalating and resolving quality issues including escalating them to the board where appropriate.”

## Appendix E: Statutory transactions – other requirements

NHS foundation trusts undertaking a statutory transaction are required under the 2006 Act, as amended by the 2012 Act, to make a formal application, which involves a number of statutory requirements. The application should be submitted after completing any applicable processes of assurance and risk assessment as specified elsewhere in this appendix.

### Mergers

A joint application by two NHS foundation trusts, or an NHS foundation trust and an NHS trust, for a merger must be accompanied by:

- written acknowledgement from the foundation trust(s) of Monitor's risk rating where the transaction was classed as significant
- evidence of approval by a majority of governors of each party which is an NHS foundation trust
- in the case of a merger with an NHS trust, a letter of support from the Secretary of State
- details of the property and liabilities being transferred and
- the constitution of the proposed new organisation following the transaction.

If the application is granted, the two trusts will be dissolved and a new NHS foundation trust will be established.

### Acquisitions

A joint application by two NHS foundation trusts or a foundation trust and an NHS trust for an acquisition by the acquiring foundation trust must be accompanied by:

- written acknowledgement from the foundation trust(s) of Monitor's risk rating where the transaction was classed as significant
- evidence of approval of the transaction by a majority of the governors of the NHS foundation trust(s)
- in the case of an acquisition of an NHS trust, a letter of support from the Secretary of State and
- the constitution of the acquiring NHS foundation trust following the transaction.

**Important note:** There is no requirement for an NHS trust or foundation trust to be separately dissolved once it has been acquired.

## Dissolutions

An application by an NHS foundation trust for its dissolution must be accompanied by:

- evidence of approval of a majority of the trust's governors
- evidence that the trust has no liabilities.

## Separations

An application by an NHS foundation trust for its separation into two or more new foundation trusts must be accompanied by:

- evidence of approval of a majority of governors of the NHS foundation trust
- specification of the property and liabilities proposed to be transferred to each new NHS foundation trust and
- the constitutions for each proposed new NHS foundation trust.

Monitor will check applications and their accompanying documents for accuracy and completeness. We may seek additional supporting information if necessary, but will not conduct an in-depth review of the contents.

## Statutory transactions: steps necessary to prepare for the transaction

We can only grant an application for a statutory transaction where we are satisfied that the trust(s) have undertaken the steps necessary to prepare for the transaction.

The table below sets out our view of what constitutes the necessary steps according to whether the transaction is small, material or significant.

Classification*	Necessary preparatory steps
Small	<ul style="list-style-type: none"><li>• the trust(s) have submitted all the relevant documents for the statutory transaction</li></ul>
Material	<ul style="list-style-type: none"><li>• the trust(s) have submitted all the relevant documents for the statutory transaction</li><li>• the trust(s) have reported the transaction to Monitor</li><li>• the trust(s) have submitted the certifications to Monitor and we are satisfied with them</li></ul>
Significant	<ul style="list-style-type: none"><li>• the trust(s) have submitted all the relevant documents for the statutory transaction</li><li>• the trust(s) have reported the transaction to Monitor</li><li>• the trust(s) have submitted the certifications to Monitor and we are satisfied with them</li></ul>

Classification*	Necessary preparatory steps
	<ul style="list-style-type: none"> <li>the transaction has been through Monitor's detailed review and has achieved a transaction risk rating of green or amber</li> </ul>

\*For definitions of 'small', 'material' and 'significant', please refer to the 'Threshold for detailed review' section above.

## Appendix F: Corporate governance statement

	Risks and mitigating actions
<p>The board is satisfied that [insert name] NHS Foundation Trust applies those principles, systems and standards of good corporate governance which reasonably would be regarded as appropriate for a supplier of healthcare services to the NHS.</p>	
<p>The board has regard to such guidance on good corporate governance as may be issued by Monitor from time to time.</p>	
<p>The board is satisfied that [insert name] NHS Foundation Trust implements:</p> <ul style="list-style-type: none"> <li>(a) effective board and committee structures</li> <li>(b) clear responsibilities for its board, for committees reporting to the board and for staff reporting to the board and those committees</li> <li>(c) clear reporting lines and accountabilities throughout its organisation.</li> </ul>	
<p>The board is satisfied that [insert name] NHS Foundation Trust effectively implements systems and/or processes:</p> <ul style="list-style-type: none"> <li>(a) to ensure compliance with the licence holder's duty to operate economically, efficiently and effectively</li> <li>(b) for timely and effective scrutiny and oversight by the board of the licence holder's operations</li> <li>(c) to ensure compliance with healthcare standards binding on the licence holder including, but not restricted to, standards specified by the Secretary of State, the Care Quality Commission, the NHS Commissioning Board and statutory regulators of healthcare professions</li> <li>(d) for effective financial decision-making, management and control including, but not restricted to, appropriate systems and/or processes to ensure the licence holder's ability to continue as a going concern</li> <li>(e) to obtain and disseminate accurate, comprehensive, timely and up-to-date information for board and committee decision-making</li> <li>(f) to identify and manage (with, but not restricted to, forward plans) material risks to compliance with the conditions of its licence</li> </ul>	

<p>(g) to generate and monitor delivery of business plans (including any changes to such plans) and to receive internal and where appropriate external assurance on such plans and their delivery</p> <p>(h) to ensure compliance with all applicable legal requirements.</p>	
<p>The board is satisfied:</p> <p>(a) there is sufficient capability at board level to provide effective organisational leadership on the quality of care provided</p> <p>(b) the board's planning and decision-making processes take timely and appropriate account of quality of care considerations</p> <p>(c) accurate, comprehensive, timely and up-to-date information on quality of care is collected</p> <p>(d) it receives and takes into account the accurate, comprehensive, timely and up-to-date information on quality of care</p> <p>(e) [insert name] NHS Foundation Trust including its board actively engages on quality of care with patients, staff and other relevant stakeholders, and takes into account as appropriate views and information from these sources</p> <p>(f) there is clear accountability for quality of care throughout [Insert name] NHS Foundation Trust including but not restricted to systems and/or processes for escalating and resolving quality issues, including escalating them to the board where appropriate.</p>	
<p>The board effectively implements systems to ensure it has personnel on the board, reporting to the board and within the rest of the licence holder's organisation who are sufficient in number and appropriately qualified to ensure compliance with the conditions of this licence.</p>	

## Appendix G: Joint ventures and academic health science centres

For NHS foundation trusts:

- that are part of a major joint venture or an academic health science centre (AHSC)
- whose boards are considering entering a major joint venture or becoming part of an AHSC.

The following statement should be made:

	Risks and mitigating actions
<p>The board is satisfied it has or continues to:</p> <ul style="list-style-type: none"> <li>• ensure the partnership will not inhibit the trust from remaining at all times compliant with the conditions of its licence</li> <li>• have appropriate governance structures in place to maintain the decision-making autonomy of the trust</li> <li>• conduct an appropriate level of due diligence relating to the partners when required</li> <li>• consider implications of the partnership on the trust's financial risk rating having taken full account of any contingent liabilities arising and reasonable downside sensitivities</li> <li>• consider implications of the partnership on the trust's governance processes</li> <li>• conduct appropriate inquiry about the nature of services provided by the partnership, especially clinical, research and education services, and consider reputational risk</li> <li>• comply with any consultation requirements</li> <li>• have the organisational and management capacity to deliver the benefits of the partnership</li> <li>• involve senior clinicians at appropriate levels in the decision-making process and receive assurance from them that there are no material concerns in relation to the partnership, including consideration of any reconfiguration of clinical, research or education services</li> <li>• address any relevant legal and regulatory issues</li> </ul>	

(including any relevant to staff, intellectual property and compliance of the partners with their own regulatory and legal framework)

- ensure appropriate commercial risks are reviewed
- maintain the register of interests and no residual material conflicts identified
- engage the governors of the trust in the development of plans and give them an opportunity to express a view on these plans.

In addition, before entering into an accredited AHSC or other major joint venture, boards of NHS foundation trusts are required to certify that they have:

- received external advice from independent professional advisers with appropriate experience and qualifications
- taken into account the best practice advice in Monitor's transaction guidance or comment by exception where this is not the case.

## **Appendix H: Continuity of services and NHS foundation trust governance licence conditions**

The RAF is designed to oversee compliance with the continuity of services conditions (primarily Condition CoS3) and NHS foundation trust Condition 4 (Condition FT4), which relates to governance. For reference, these can be found in this appendix.

For more information on the licence, including other sections and guidance on complying with other requirements see [www.gov.uk/government/organisations/monitor](http://www.gov.uk/government/organisations/monitor)

### **Condition CoS1 – Continuing provision of Commissioner Requested Services**

1. The Licensee shall not cease to provide, or materially alter the specification or means of provision of, any Commissioner Requested Service otherwise than in accordance with the following paragraphs of this Condition.
2. If, during the period of a contractual or other legally enforceable obligation to provide a Commissioner Requested Service, or during any period when this condition applies by virtue of Condition G9(1)(b), Monitor issues to the Licensee a direction in writing to continue providing that service for a period specified in the direction, then the Licensee shall provide the service for that period in accordance with the direction.
3. The Licensee shall not materially alter the specification or means of provision of any Commissioner Requested Service except:
  - (a) with the agreement in writing of all Commissioners to which the Licensee is required by a contractual or other legally enforceable obligation to provide the service as a Commissioner Requested Service or
  - (b) at any time when this condition applies by virtue of Condition G9(1)(b), with the agreement in writing of all Commissioners to which the Licensee provides, or may be requested to provide, the service as a Commissioner Requested Service or
  - (c) if required to do so by, or in accordance with the terms of its authorisation by, any body having responsibility pursuant to statute for regulating one or more aspects of the provision of healthcare services in England and which has been designated by Monitor for the purposes of this condition and of equivalent conditions in other licences granted under the 2012 Act.
4. If the specification or means of provision of a Commissioner Requested Service is altered as provided in paragraph 3, the Licensee, within [28] days

of the alteration, shall give to Monitor notice in writing of the occurrence of the alteration with a summary of its nature.

5. For the purposes of this Condition an alteration to the specification or means of provision of any Commissioner Requested Service is material if it involves the delivery or provision of that service in a manner which differs from the manner specified and described in:
  - (a) the contract in which it was first required to be provided to a Commissioner at or following the coming into effect of this Condition;  
or
  - (b) if there has been an alteration pursuant to paragraph 3, the document in which it was specified on the coming into effect of that alteration or
  - (c) at any time when this Condition applies by virtue of Condition G9(1)(b), the contract, or NHS contract, by which it was required to be provided immediately before the commencement of this Licence or the Licensee's authorisation, as the case may be.

#### **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 and

the 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:

<b>‘disposal’</b>	<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, and references to ‘dispose’ are to be read accordingly</p>
<b>‘relevant asset’</b>	<p>means any item of property, including buildings, interests in land, equipment (including rights, licences and consents relating to its use), without which the Licensee’s ability to meet its obligations to provide Commissioner Requested Services would reasonably be regarded as materially prejudiced</p>
<b>‘relinquishment of control’</b>	<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.

### **Condition CoS3 – Standards of corporate governance and financial management**

1. The Licensee shall at all times adopt and apply systems and standards of corporate governance and of financial management which reasonably would be regarded as:
  - (a) suitable for a provider of the Commissioner Requested Services provided by the Licensee and
  - (b) providing reasonable safeguards against the risk of the Licensee being unable to carry on as a going concern.
2. In its determination of the systems and standards to adopt for the purpose of paragraph 1, and in the application of those systems and standards, the Licensee shall have regard to:
  - (a) such guidance as Monitor may issue from time to time concerning systems and standards of corporate governance and financial management
  - (b) the Licensee's rating using the risk rating methodology published by Monitor from time to time and
  - (c) the desirability of that rating being not less than the level regarded by Monitor as acceptable under the provisions of that methodology.

### **Condition CoS4 – Undertaking from the ultimate controller**

1. The Licensee shall procure from each company or other person which the Licensee knows or reasonably ought to know is at any time its ultimate controller, a legally enforceable undertaking in favour of the Licensee, in the form specified by Monitor, that the ultimate controller ('the Covenantor'):
  - (a) will 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 2012 Act or this Licence and

- (b) will 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 this Licence to provide information to Monitor.
2. The Licensee shall obtain any undertaking required to be procured for the purpose of paragraph 1 within 7 days of a company or other person becoming an ultimate controller of the Licensee and shall ensure that any such undertaking remains in force for as long as the Covenantor remains the ultimate controller of the Licensee.
  3. The Licensee shall:
    - (a) deliver to Monitor a copy of each such undertaking within seven days of obtaining it
    - (b) inform Monitor immediately in writing if any Director, secretary or other officer of the Licensee becomes aware that any such undertaking has ceased to be legally enforceable or that its terms have been breached and
    - (c) comply with any request which may be made by Monitor to enforce any such undertaking.
  4. For the purpose of this Condition, subject to paragraph 5, a person (whether an individual or a body corporate) is an ultimate controller of the Licensee if:
    - (a) directly, or indirectly, the Licensee can be required to act in accordance with the instructions of that person acting alone or in concert with others and
    - (b) that person cannot be required to act in accordance with the instructions of another person acting alone or in concert with others.
  5. A person is not an ultimate controller if they are:
    - (a) a health service body, within the meaning of section 9 of the 2006 Act
    - (b) a Governor or Director of the Licensee and the Licensee is an NHS foundation trust

- (c) any Director of the Licensee who does not, alone or in association with others, have a controlling interest in the ownership of the Licensee and the Licensee is a body corporate or
- (d) a trustee of the Licensee and the Licensee is a charity.

#### **Condition CoS5 – Risk pool levy**

1. The Licensee shall pay to Monitor any sums required to be paid in consequence of any requirement imposed on providers under Section 135(2) of the 2012 Act, including sums payable by way of levy imposed under Section 139(1) and any interest payable under Section 143(10), by the dates by which they are required to be paid.
2. In the event that no date has been clearly determined by which a sum referred to in paragraph 1 is required to be paid, that sum shall be paid within 28 days of being demanded in writing by Monitor.

#### **Condition CoS6 – Co-operation in the event of financial stress**

1. The obligations in paragraph 2 shall apply 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.
2. When this paragraph applies the Licensee shall:
  - (a) provide such information as Monitor may direct to Commissioners and to such other persons as Monitor may direct
  - (b) allow such persons as Monitor may appoint to enter premises owned or controlled by the Licensee and to inspect the premises and anything on them and
  - (c) co-operate with such persons as Monitor may appoint to assist in the management of the Licensee's affairs, business and property.

#### **Condition CoS7 – Availability of resources**

1. The Licensee shall at all times act in a manner calculated to secure that it has, or has access to, the Required Resources.
2. The Licensee shall not enter into any agreement or undertake any activity which creates a material risk that the Required Resources will not be available to the Licensee.
3. The Licensee, not later than two months from the end of each financial year, shall submit to Monitor a certificate as to the availability of the Required Resources for the period of 12 months commencing on the date of the certificate, in one of the following forms:

- (a) “After making enquiries the Directors of the Licensee have a reasonable expectation that the Licensee will have the Required Resources available to it after taking into account distributions which might reasonably be expected to be declared or paid for the period of 12 months referred to in this certificate.”
- (b) “After making enquiries the Directors of the Licensee have a reasonable expectation, subject to what is explained below, that the Licensee will have the Required Resources available to it after taking into account in particular (but without limitation) any distribution which might reasonably be expected to be declared or paid for the period of 12 months referred to in this certificate. However, they would like to draw attention to the following factors which may cast doubt on the ability of the Licensee to provide Commissioner Requested Services.”
- (c) “In the opinion of the Directors of the Licensee, the Licensee will not have the Required Resources available to it for the period of 12 months referred to in this certificate.”
4. The Licensee shall submit to Monitor with that certificate a statement of the main factors which the Directors of the Licensee have taken into account in issuing that certificate.
5. The statement submitted to Monitor in accordance with paragraph 4 shall be approved by a resolution of the board of Directors of the Licensee and signed by a Director of the Licensee pursuant to that resolution.
6. The Licensee shall inform Monitor immediately if the Directors of the Licensee become aware of any circumstance that causes them to no longer have the reasonable expectation referred to in the most recent certificate given under paragraph 3.
7. The Licensee shall publish each certificate provided for in paragraph 3 in such a manner as will enable any person having an interest in it to have ready access to it.
8. In this Condition:

<b>‘distribution’</b>	includes the payment of dividends or similar payments on share capital and the payment of interest or similar payments on public dividend capital and the repayment of capital
<b>‘financial year’</b>	means the period of 12 months over which the Licensee normally prepares its accounts

<b>'required resources'</b>	<p>means such:</p> <ul style="list-style-type: none"> <li>(a) management resources</li> <li>(b) financial resources and financial facilities</li> <li>(c) personnel</li> <li>(d) physical and other assets including rights, licences and consents relating to their use and</li> <li>(e) working capital</li> </ul> <p>as reasonably would be regarded as sufficient to enable the Licensee at all times to provide the Commissioner Requested Services.</p>
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#### **Condition FT4 – NHS foundation trust governance arrangements**

1. This condition shall apply if the Licensee is an NHS foundation trust, without prejudice to the generality of the other conditions in this Licence.
2. The Licensee shall apply those principles, systems and standards of good corporate governance which reasonably would be regarded as appropriate for a supplier of healthcare services to the NHS.
3. Without prejudice to the generality of paragraph 2 and to the generality of General Condition 5, the Licensee shall:
  - (a) have regard to such guidance on good corporate governance as may be issued by Monitor from time to time and
  - (b) comply with the following paragraphs of this Condition.
4. The Licensee shall establish and implement:
  - (a) effective board and committee structures
  - (b) clear responsibilities for its Board, for committees reporting to the Board and for staff reporting to the Board and those committees and
  - (c) clear reporting lines and accountabilities throughout its organisation.
5. The Licensee shall establish and effectively implement systems and/or processes:
  - (a) to ensure compliance with the Licensee's duty to operate economically, efficiently and effectively
  - (b) for timely and effective scrutiny and oversight by the Board of the Licensee's operations

- (c) to ensure compliance with healthcare standards binding on the Licensee including but not restricted to standards specified by the Secretary of State, the Care Quality Commission, the NHS Commissioning Board and statutory regulators of healthcare professions
  - (d) for effective financial decision-making, management and control (including but not restricted to appropriate systems and/or processes to ensure the Licensee's ability to continue as a going concern)
  - (e) to obtain and disseminate accurate, comprehensive, timely and up to date information for Board and Committee decision-making
  - (f) to identify and manage (including but not restricted to manage through forward plans) material risks to compliance with the Conditions of its Licence
  - (g) to generate and monitor delivery of business plans (including any changes to such plans) and to receive internal and where appropriate external assurance on such plans and their delivery and
  - (h) to ensure compliance with all applicable legal requirements.
6. The systems and/or processes referred to in paragraph 5 should include but not be restricted to systems and/or processes to ensure:
- (a) that there is sufficient capability at Board level to provide effective organisational leadership on the quality of care provided
  - (b) that the Board's planning and decision-making processes take timely and appropriate account of quality of care considerations
  - (c) the collection of accurate, comprehensive, timely and up to date information on quality of care
  - (d) that the Board receives and takes into account accurate, comprehensive, timely and up to date information on quality of care
  - (e) that the Licensee, including its Board, actively engages on quality of care with patients, staff and other relevant stakeholders and takes into account as appropriate views and information from these sources and
  - (f) that there is clear accountability for quality of care throughout the Licensee's organisation including but not restricted to systems and/or processes for escalating and resolving quality issues including escalating them to the Board where appropriate.

7. The Licensee shall ensure the existence and effective operation of systems to ensure that it has in place personnel on the Board, reporting to the Board and within the rest of the Licensee's organisation who are sufficient in number and appropriately qualified to ensure compliance with the Conditions of this Licence.
8. The Licensee shall submit to Monitor within three months of the end of each financial year:
  - (a) a corporate governance statement by and on behalf of its Board confirming compliance with this Condition as at the date of the statement and anticipated compliance with this Condition for the next financial year, specifying any risks to compliance with this Condition in the next financial year and any actions it proposes to take to manage such risks and
  - (b) if required in writing by Monitor, a statement from its auditors either:
    - (i) confirming that, in their view, after making reasonable enquiries, the Licensee has taken all the actions set out in its corporate governance statement applicable to the past financial year or
    - (ii) setting out the areas where, in their view, after making reasonable enquiries, the Licensee has failed to take the actions set out in its corporate governance statement applicable to the past financial year



Making the health sector  
work for patients

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