

Title: Health Special Administration Regulations IA No: 6082 Lead department or agency: Department of Health Other departments or agencies:	Impact Assessment (IA)
	Date: 3 July 2012
	Stage: Consultation
	Source of intervention: Domestic
	Type of measure: Secondary legislation
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Summary: Intervention and Options	RPC Opinion: Amber

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£m	£m	£m	Yes	NA
			Yes	NA

What is the problem under consideration? Why is government intervention necessary?

There are currently no specific arrangements in place to protect patients' interests if a company providing NHS services fails. To address this, the Health and Social Care Act 2012 sets out a continuity of services framework and Chapter 5 of Part 3 of the Act introduces a health special administration (HSA) procedure for companies providing NHS services. Section 130 of the Act requires regulations to set out further details about the procedure. The draft regulations are based on insolvency law and practice, including special administration regimes in other regulated sectors. The consultation explores options for ensuring that the HSA procedure is appropriate to the healthcare sector.

What are the policy objectives and the intended effects?

The objective of the HSA procedure, as set out in primary legislation, is to secure the continuity of certain NHS services in line with commissioners' requirements if a company fails. Financial assistance to pay for service continuity would be made available in HSA under the mechanisms to be established by Monitor (under Chapter 6 of Part 3 of the 2012 Act) and continuity would be ensured by either rescuing the company as a going concern and/or transferring services to one or more alternative providers. The intended effect is to secure continuity of supply whilst minimising deterrence of new entry and of new investment in the provision of healthcare services.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Options are limited by the 2012 Act which requires technical details to be based on existing insolvency law, in particular the process of administration set out in Part 2 of the Insolvency Act 1986. Draft regulations do this by drawing on existing special administration regimes in other sectors. The Do Minimum option is to follow such precedents and divergences from this option need to be justified. This IA considers: (a) the circumstances in which public consultation on service continuity plans is required; (b) a reduction of administrative burdens in HSA by limiting publicity requirements; and (c) providing an exit route from HSA to 'ordinary' administration.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 04/2017					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		MicroNo	< 20 No	SmallNo	Medium No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded:	
				Non-traded:	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Recommended Option: Consultations required where there is a significant service reconfiguration, and providing an option to move from HSA to Normal administration. (NB: Publicity requirements are not considered as they are not part of the draft regulations)

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	n/a see below	n/a see below	n/a see below

Description and scale of key monetised costs by 'main affected groups'

Consultation requirements - monetised cost of £0.53 - 13.6 million per consultation (based the cost of running the consultation and employing the special administrator for a longer time period). It is impossible to estimate how many consultations will occur as the number of companies that will be subject to continuity of service conditions, their failure rate and how many of these will result in significant reconfiguration are all unknown.

Other key non-monetised costs by 'main affected groups'

Consultation requirements - Cost of uncertainty surrounding both the need for, and the results of a consultation.
 - Cost of ongoing trading losses as a result of the consultation.
 - Reduced scope for prompt resolution (where this would involve a significant variation in NHS services.)

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	n/a see below	n/a see below	n/a see below

Description and scale of key monetised benefits by 'main affected groups'

No benefits have been monetised in this consultation impact assessment.

Other key non-monetised benefits by 'main affected groups'

Consultation requirements - Patient and public have an opportunity to engage with significant reconfigurations and provides an opportunity for errors, omissions and other issues in significant reorganisation plans to be noticed and addressed
Providing an option to exit HSA to normal administration - Potentially better returns to creditors.
Publicity requirements - Cost savings of due to not reprinting / stamping healthcare specific documents

Key assumptions/sensitivities/risks	Discount rate (%)
Design of the financial support mechanisms ensures that creditors are no worse off than in a normal administration	

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs: Benefits: Net:	Yes	

Evidence Base (for summary sheets)

Scope of this Impact Assessment

1. Chapter 5 of Part 3 of the Health and Social Care Act 2012 ('the 2012 Act') introduces a health special administration ('HSA') procedure to ensure the continuity of certain NHS services if a company fails. Further details must be set out in regulations to be made under the affirmative parliamentary procedure and the Secretary of State is obliged to consult before making those regulations.
2. This impact assessment is limited in scope as the number of providers which could be subject to HSA, the nature and the extent of services to be protected, and the financial mechanisms to fund continuity have yet to be determined. The draft regulations set out technical details of HSA and this impact assessment considers only the specific nature of the procedure. It does not assess the HSA procedure in its entirety but only the additional impact of these regulations beyond that determined in the 2012 Act. In other words, only the impact of the secondary legislation is considered.
3. The following areas have considerable impacts upon the functioning of HSA but are out of scope for this impact assessment as they will be considered in other areas:
 - the number of providers within the scope of HSA will be determined by the licensing arrangements under the 2012 Act; and
 - financial assistance mechanisms to pay for service continuity must be established by Monitor¹. Monitor will be required to develop and consult upon the methodology used to calculate contributions and the functioning of these financial mechanisms. This impact assessment does not attempt to anticipate Monitor's work in this area.
4. Additionally the following areas are determined by precedent, by that we mean our assumptions in this impact assessment are based on what is currently standard practice. There are no reasonable arguments for departure from these precedents for HSA. These areas are not assessed within the options but information on the rationale is provided within the background section:
 - criteria for commissioners in identifying essential services (precedent from the continuity regime for NHS foundation trusts set out in Chapter 5A of Part 2 of the NHS Act 2006 as amended by Part 4 of the 2012 Act); and
 - HSA can only begin if a company is insolvent (this is consistent with the test for commencing an 'ordinary' administration and special administration regimes in other regulated sectors).
5. The impact assessments published alongside the 2012 Act assessed the impact of the wider sector regulation policy, including the licensing regime for healthcare providers and the general continuity of services framework established by the Act.

Background

The NHS continuity of services framework

6. The 2012 Act outlines the development of a continuity of services framework, where local clinical commissioners, in consultation with Health and Wellbeing Boards, will be responsible for securing continued access to healthcare services that meet the needs of local communities.
7. Monitor's role in the continuity of services framework will be to support commissioners in securing continued access to NHS services. Through the licensing regime, and an on-going assessment of

¹ See Chapter 6 of Part 3 of the Health and Social Care Act 2012.

risk to continued access to NHS services, Monitor must intervene when there is an unacceptable risk to service provision.

8. Where there is a significant risk that patients may not have continued access to essential NHS services, both commissioners and Monitor will intervene to reduce the risk. Firstly, commissioners may use contractual levers to improve performance and consider contingency plans that they may have with alternative providers. Secondly, Monitor will use the licensing regime to support commissioners in reducing this risk. Examples of interventions that Monitor could use include requiring providers to produce turnaround plans, the appointment of turnaround teams to increase board capacity to resolve these issues or asking providers to do or not to do specified things.
9. These intervention proposals build and improve upon the current regime for foundation trusts, established under the Health Act 2009, by extending equivalent safeguards to all providers of NHS services to secure continuity in the interests of patients. As a last resort, Monitor will have the power to appoint an administrator to take control of a foundation trust and implement joint action with commissioners to secure continuity of services.
10. The HSA procedure provides similar protections for patients to ensure the continuity of NHS services if a company fails.

Rationale for intervention

11. The Act establishes a comprehensive system of sector regulation, which is applicable to all providers of NHS services. This is necessary to ensure that there are appropriate safeguards to protect patients' interests, irrespective of who provides their NHS services.
12. There are currently no special legal arrangements to ensure the continuity of NHS services if a company fails. Companies providing NHS services that become insolvent could be subject to corporate insolvency procedures, which focus on the interests of creditors and do not include specific arrangements to ensure the continuity of essential healthcare services.
13. The HSA framework will ensure that patients are protected equally from the risks of provider failure irrespective of whether they are treated at an NHS or private provider.
14. Since the requirement for HSA, and certain features of it, were determined by the 2012 Act this impact assessment considers the problem of how to tailor a special administration regime to the specifics of the comprehensive health service.
15. More details on the Government's proposals can be found in the documents 'Securing continued access to NHS services'² and 'Protecting and promoting patients' interests: the role of Sector Regulation'³.

Policy objectives

16. In certain regulated sectors, for example utilities and transport, special administration regimes exist to ensure the ongoing supply of essential public services if a provider fails. Those regimes are based on the insolvency process of administration and include state funding arrangements to ensure service continuity.
17. The regulations aim to create a special administration procedure tailored to the healthcare sector, based upon the provisions of the 2012 Act.
18. The primary objective of HSA as set out in the Act⁴ is to ensure patients have continued access to essential NHS services. This aim is set out as the objective of HSA in the 2012 Act and is the primary reason for the introduction of the HSA procedure.
19. HSA also has additional aims, subject to ensuring continued access to essential NHS services:
 - Protecting the interests of creditors and members⁵.

² Available at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_127443.

³ Available at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_131609.

⁴ Chapter 5A of Part 2 of the NHS Act 2006.

- Facilitating the rescue of a failed provider as a going concern would take priority⁶ to produce the best outcome for both patients and those with a financial interest in the failed provider.
 - Requirements for the health special administrator to act quickly and efficiently to achieve service continuity which should minimise burdens⁷.
20. The ultimate intended effect is, as efficiently as possible, to secure needed continuity of supply whilst minimising deterrence of new entry and of new financial investment in provision of healthcare services.

Policy: HSA procedure for companies providing NHS services

21. As outlined above, the 2012 Act sets out licensing arrangements, regulatory interventions and mechanisms to support service continuity to protect the interests of patients.
22. To protect the interests of patients, Chapter 5 of Part 3 of the 2012 Act sets out the broad framework for a HSA procedure and requires further details of that process to be set out in secondary legislation. HSA would be an alternative to ordinary insolvency procedures and would provide an additional tool for Monitor to support commissioners in ensuring the continuity of NHS services.
23. Some of the key features of the HSA procedure, as set out in the 2012 Act, are:
- the procedure could only be applied to ‘relevant providers’ (see below);
 - HSA is court-based and could only start by court order;
 - only Monitor may apply to the court for an HSA order;
 - a qualified insolvency practitioner would be appointed to act as the health special administrator;
 - the health special administrator would take control of the failed company and its property and would be obliged to achieve the objective of HSA which is to ensure the continuity of NHS services in line with commissioners’ requirements; and
 - continuity would be secured by rescuing the provider as a going concern and/or transferring services to alternative providers.
24. The 2012 Act requires regulations to set out further details of HSA based on insolvency law, in particular the process of administration set out in Part 2 of the Insolvency Act 1986. The draft regulations must be subject to consultation and the affirmative parliamentary procedure.
25. The consultation paper includes a working draft of the regulations and, to assist readers, a write-out of the normal administration procedure as applied and modified by the draft regulations. Comments will be invited on the overall design of the regime as well as technical details.
26. To make HSA work in practice, subordinate legislation (rules) will also be required and those rules will be developed after consultation on the regulations. The rules will need to be approved by the Insolvency Rules Committee (a body of insolvency experts, including the judiciary) in keeping with the requirements of section 413 of the Insolvency Act 1986. This general approach reflects the way in which the underlying insolvency legislation works.
27. It is expected that the regulations and the rules will be laid before Parliament in 2013 in order to bring HSA into effect from April 2014. This would be consistent with the introduction of licensing arrangements for independent sector providers and the special funding mechanisms for ensuring service continuity, developments in those areas will inform future impact assessments on the HSA regulations.
28. As in other special administration regimes, the draft regulations impose restrictions on the commencement of ordinary insolvency proceedings and the enforcement of security. This is to

⁵ Section 128(6) of the 2012 Act.

⁶ Section 129 of the 2012 Act.

⁷ Section 128(6) of the 2012 Act.

provide a necessary safeguard to ensure that Monitor has an opportunity to intervene, where necessary, to trigger HSA to protect the interests of patients. However, Monitor would not have to wait for a person to attempt to trigger ordinary insolvency in order to be able to seek an HSA order from the court and Monitor should intervene proactively, where necessary, to ensure service continuity.

29. Also in keeping with existing special administration regimes, the rights of creditors are restricted subject to achieving the overall objective of the procedure, which is to ensure the continuity of NHS services that commissioners determine must be secured. For example, unlike an 'ordinary' administration, a meeting of creditors would not be held to consider the health special administrator's proposals for achieving the objective of HSA although (as explored below) the regulations include an option for public consultation on continuity plans in appropriate cases.
30. To safeguard the interests of creditors, the HSA procedure prioritises the rescue of the company as a going concern and, subject to actions necessary to achieve the continuity of services objective, the health special administrator is obliged to protect the interests of the creditors of the provider as a whole (and, subject to those interests, the interests of the company's members)⁸. The normal rights of creditors and others would be restored where the company exits administration as a going concern. To provide flexibility, as in an 'ordinary' administration, a rescue could be achieved through agreeing a voluntary arrangement with the company's creditors and the ongoing rights of creditors would be determined by the terms of the agreed arrangement.
31. Where a rescue is not feasible or would not produce the best outcome, the draft regulations make provision for the transfer of protected services (including property, rights and liabilities) as a going concern from the failed company to one or more alternative providers. Such a transfer could not be forced on to alternative providers and must be agreed by the health special administrator, the provider to which the services are being transferred, and Monitor.
32. As soon as the continuity of services had been ensured in line with commissioners' requirements, HSA would be brought to an end. Where continuity of essential services had been ensured through the transfer of services, the company could be moved to 'ordinary' administration or a liquidation (whichever was in the best interests of creditors).
33. No changes are proposed to the normal statutory ranking for paying the claims of creditors in an insolvency.
34. Financial assistance necessary to ensure service continuity would be provided under the mechanisms ('risk pool') to be established by Monitor under Chapter 6 of Part 3 of the 2012 Act (see Annex B).

Providers within scope of HSA

35. The number of providers within scope of the HSA procedure if they fail, and the nature and extent of the NHS-services to be protected, will be determined by licensing arrangements and the decisions of commissioners.
36. To assist commissioners, Monitor must produce guidance (agreed by the Secretary of State and the NHS Commissioning Board) on ensuring the continuity of NHS services.
37. HSA is intended as a last resort safeguard where other options to ensure service continuity have either been exhausted or would not best protect patients' interests, for example because a provider had collapsed quickly and insolvency protection was needed to enable ongoing service provision. The number of providers that may be subject to HSA will also therefore be influenced by pre-insolvency regulatory interventions designed to stop service failure.
38. In keeping with insolvency law and special administration regimes in other sectors, the draft regulations specify that the court could only make an HSA order where a provider is insolvent, i.e. it is unable, or is likely to become unable, to pay its debts. This means that Monitor would only be able to intervene to trigger HSA where this threshold was met.

⁸ Sections 128(6)(c) and (d) of the Health and Social Care Act 2012.

39. HSA provides an alternative to existing corporate insolvency procedures, for example administration and liquidation. Monitor could allow ordinary insolvency to proceed where this would not jeopardise the continuity of essential NHS services.
40. To inform those with a financial interest in the provider, the regulations require Monitor to maintain and publish a register of companies that are potentially within scope of the HSA procedure on failure. The intention is that this should be a publicly available internet based register.

Criterion for commissioners

41. The draft regulations set out the test that commissioners must apply in determining which NHS services must be secured where a provider fails. The test is that ceasing to provide the service would, in the absence of alternative arrangements for its provision as part of the NHS, be likely to:
 - have a significant adverse impact on the health of persons in need of the service or significantly increase health inequalities, or
 - cause a failure to prevent or ameliorate either a significant adverse impact on the health of such persons or a significant increase in health inequalities.
42. To assist commissioners in making this determination, the draft regulations oblige Monitor to publish guidance, which must be approved by the Secretary of State and the NHS Commissioning Board.
43. This approach is consistent with the continuity of services framework set out in the 2012 Act, including continuity arrangements in the event of the failure of an NHS foundation trust and so other options have not been considered.

Insolvency test

44. The draft regulations provide that the court may only make an HSA order where the company is unable, or is likely to become unable, to pay its debts. This means that Monitor would not be able to intervene to trigger HSA at a pre-insolvency stage; instead, licensing conditions will determine the nature and scope of pre-insolvency regulatory interventions.
45. Other options have therefore not been considered as this insolvency test is well established and understood. This approach is also consistent with the test for the court to commence an 'ordinary' administration. The same threshold applies in other special administration regimes and is the trigger for commencing the 'trust special administrator regime' for NHS foundation trusts.

Draft HSA regulations

46. The consultation paper includes a copy of the draft regulations and a write-out of 'ordinary' administration as applied and modified by the regulations, which shows how the process would work from beginning to end. Views are sought on the overall regime and specific technical details.
47. The procedure set out in the draft regulations would work as follows:
 - Where Monitor decides that HSA is needed to ensure the continuity of NHS services to protect patients' interests, it would apply to the court for the making of an HSA order.
 - The court could only make an HSA order if the provider is insolvent which means that the company is unable, or is likely to become unable, to pay its debts.
 - An insolvency practitioner would be appointed by the court as the health special administrator and would take control of the company, its business and property.
 - To give the health special administrator time to secure service continuity and to protect assets for the benefit of creditors as a whole, a moratorium would prevent others from taking action against the company and its property.
 - Where needed, Monitor would provide funding (under the financial mechanisms to be established) to ensure service continuity.
 - Commissioners would make a final determination, based on health needs and equalities, as to which NHS services must be secured.

- The health special administrator would agree proposals for ensuring service continuity with commissioners and Monitor.
 - Where those proposals would involve a significant reconfiguration of NHS services, the plans would be subject to public consultation.
 - The health special administrator would agree revisions to proposals with commissioners and Monitor.
 - The final proposals would be sent to creditors and other interested parties and published.
 - The health special administrator would be required to act in accordance with the plans agreed with commissioners and Monitor.
 - The objective of HSA would be achieved by rescuing the company as a going concern and/or transferring services to one or more alternative providers.
 - HSA would end as soon as the objective has been achieved and outcomes would include:
 - rescuing the company as a going concern, which could include agreeing a voluntary arrangements with the company's creditors;
 - moving the company to ordinary insolvency proceedings, e.g. administration or liquidation; or
 - dissolution to end the company's existence where no assets remain to be distributed to the company's creditors (the company has in effect been wound up through HSA).
48. The draft regulations apply and make changes to the process of 'ordinary' administration set out in the Insolvency Act 1986, and the draft mirrors the form and content of existing special administration regimes, which have a continuity of essential public services objective. To ensure that HSA is appropriate to the requirements of the healthcare sector, the draft regulations also draw on the continuity arrangements for services provided by NHS foundation trusts, which are updated by the 2012 Act.
49. The consultation seeks views where the draft regulations may depart from those precedents and where options exist.

Description of the areas considered in this impact assessment:

50. As shown above, the major features of HSA are determined by the Act and therefore fall outside the scope of this impact assessment. However, within the constraints of the Act and precedents in insolvency law and existing special administration regimes, there are certain areas where there are still options to consider where there is a rationale for departing departure from established precedents.
51. There are provisions in the 2012 Act⁹ for Monitor to establish and operate financial assistance mechanisms to fund service continuity in HSA. The costs associated with those financial provisions are not assessed in this impact assessment as Monitor is responsible for establishing and operating those mechanisms and assessing the impact of options. Monitor will consult of the methodology for these financial assistance mechanisms in due course ahead of the HSA procedure coming into effect.
52. This impact assessment considers options under the following areas:
- ◆ **Section A: Public consultation during HSA**
 - ◆ **Section B: Publicity requirements for companies in HSA**
 - ◆ **Section C: Providing a route from HSA to 'ordinary' administration**

⁹ Chapter 6 of Part 3 of the Health and Social Care Act 2012.

Section A: Public consultation during HSA

53. In an 'ordinary' administration, the administrator is generally obliged to hold a first meeting of creditors to consider proposals for achieving the purpose of the administration¹⁰. At that meeting, the creditors decide whether to approve the proposals (with or without modification) or reject them.
54. The requirement to hold such a meeting of creditors is not applied in existing special administration regimes and instead the special administrator issues proposals for information purposes only. This reflects the unique continuity of supply objectives of special administration regimes.
55. In keeping with those regimes, the draft HSA regulations do not apply the requirements for a meeting of creditors to be held to consider the health special administrator's proposals. However, the draft regulations provide for a process of public consultation on the health special administrator's proposals for ensuring service continuity where that would involve a significant variation in healthcare services provided as part of the NHS. Consultation may therefore be required where continuity plans involved the transfer of some or all NHS services to alternative providers at another location. The public consultation would run for 6 weeks and the process would be similar to the consultation requirements set out in the 'trust special administrator' regime for NHS foundation trusts.¹¹ Public consultation acknowledges the keen public interest in significant changes to the provision of NHS services and would allow public input into the process, which may produce a better outcome.
56. Consultation is, however, likely to prolong the duration of HSA and could delay payments to creditors. A consultation period is also likely to add significantly to costs to be paid via the funding mechanisms to be established by Monitor, especially where financial assistance is needed to meet any ongoing trading losses associated with the provision of NHS services. There is also a risk that the uncertainty associated with consultation could jeopardise service provision, for example due to staff retention problems.
57. The consultation paper on the draft regulations therefore seeks views on whether consultation should be mandatory in some cases or whether there is scope to provide flexibility to enable decisions to be taken on a case-by-case basis depending on the circumstances of a particular failure and the impact of the choice amongst plausible proposals for service continuity.
58. Four options have been assessed in this area:
 - ◆ **Option 1 – no consultation (do nothing);**
 - ◆ **Option 2 – optional consultation at the discretion of commissioners and Monitor;**
 - ◆ **Option 3 – mandatory consultation where continuity proposals would involve a significant variation in the provision of NHS services; and**
 - ◆ **Option 4 – mandatory consultation in all cases;**
59. To assess these options, the costs and benefits of holding a consultation are considered below.

Benefits of holding a consultation

60. The benefits of holding a consultation are likely to be:
 - better public and patient engagement, and an opportunity for all needs to be reflected in service redesign;
 - an opportunity for errors, omissions and other issues in reorganisation plans to be noticed and addressed; and
 - obtaining additional information to determine which is the best option, both for patients and those with a financial interest in the outcome.
61. The scale of the benefits of a consultation are likely to depend on the extent, if any, of service reconfiguration proposed and the range of feasible options for ensuring service continuity; the greater the range of options that are plausible (for example, regarding location of services), the

¹⁰ Paragraph 52 of Schedule B1 to the Insolvency Act 1986 sets out circumstances where such a meeting is not held, for example where creditors would be paid in full.

¹¹ Chapter 5A of Part 2 of the NHS Act 2006.

more important is the additional information that may be provided during consultation in determining which is the best option, both for patients and those with a financial interest in the outcome. Where the provision of NHS services would be unaffected by the proposals, for example because the company could be rescued as a going concern, or where there is no plausible alternative to the reconfiguration proposed, the benefits of a public consultation are likely to be low.

Costs of holding a consultation

62. The monetised cost of a consultation is estimated to be in the range of £0.5 – £13.6 million. This is based upon HSA being extended for an additional 8 -10 weeks to accommodate a 6-week consultation process and to allow time for responses to be considered and for proposals to be revised and agreed. The high degree of uncertainty in this estimate reflects the various options for achieving continuity through HSA depending on factors such as the nature of the provider, the reasons for its failure and likely exit route from HSA.
63. A further source of costs associated with delay is the loss to the value of the business consequent upon any loss of staff or contractual relations due to continued uncertainty.
64. The costs associated with public consultation and the ongoing provision of NHS services would be met from the financial assistance mechanisms to be established by Monitor to which providers (and perhaps commissioners) would contribute.

Figure 1: Estimated costs of a consultation

	Lower	Upper
Additional length of administration due to consultation	8 weeks	10 weeks
Cost of administration per week	0.067 million ¹²	1.35 million ¹³
Cost of ongoing administration costs	0.53 million	13.5 million
Cost of ongoing losses / profit opportunities missed as a result of the administration	Unknown, this would depend entirely upon the specifics on the administration in question and cannot be estimated reliably.	
Cost of running the consultation	0 (consultation costs borne internally within administrators general costs)	0.1 ¹⁴
Cost of loss of staff/contracts due to continued uncertainty	Unknown, this would depend entirely upon the specifics on the administration in question and cannot be estimated reliably.	
Total Cost Monetised	0.53 million	13.6 million
Non-monetised Costs	Cost of meeting ongoing trading losses associated with the delivery of services during the lengthened administration	

65. The scale of these costs is likely to be related to several factors including the nature and size of the provider, the reasons for its failure and the complexity of its affairs. Other important factors will be the scale of NHS service provision and the profitability of those services, the extent to which protected services and associated assets can readily be separated from other business activities, and the extent of service redesign. This highlights the large degree of uncertainty associated with a particular failure.





¹² Based on publicly available information about an administration for a private sector hospital.

¹³ Based on publicly available information about a special administration case.

¹⁴ Internal DH estimate of consultation costs.

Summary of costs and benefits

Figure 2: The costs and benefits of a public consultation (illustrative)

Cost of consultation (£)	Low benefits, High costs 	High benefits, High costs 
	Low benefits, Low costs 	High benefits, Low costs 
	Benefit of consultation	

66. The table above highlights the implications of this large degree of uncertainty surrounding the costs and benefits associated with any given consultation. We lack the information to know where potential administrations would fall within this chart. Therefore, for the purposes of this impact assessment we have assumed that consultations could fall into any section of figure 2 above.

Option 1 – No consultation (do nothing)

67. This option would not require, or enable commissioners and Monitor to direct, the health special administrator to hold a consultation upon plans for achieving service continuity. This has no additional costs, and offers none of the benefits of a consultation. It is a base case of no intervention with zero net present value.
68. This option minimises the additional costs (to zero) but also removes any potential benefits to the public, overall it would be optimal if the costs of a particular consultation are high and the potential benefit is low. However, given the variation surrounding the costs and benefits depending upon the specific circumstances of a failed provider and the nature of continuity plans, it would prevent a consultation where costs would be low relative to the potential benefit.
69. The Department does not propose this option as it does not offer any flexibility and would prevent consultation which would be justified if analysed on a case-by-case basis.

Option 2 – Optional consultation determined on a case-by-case- basis

70. This option would allow commissioners and Monitor to determine on a case-by-case basis whether public consultation is required.
71. Given the wide range of costs and benefits associated with a consultation (see above) this would enable commissioners and Monitor to assess the costs and benefits on a case-by-case basis and respond appropriately to a particular failure.
72. If the anticipated costs of the consultation were high, (e.g. a large and complex provider was insolvent) but the public interest benefits of consultation were low (e.g. the health special administrator's plans involved little change to NHS service provision) then commissioners and Monitor would be unlikely to require a consultation.
73. However, if the costs were low (e.g. a small potentially single service provider had failed) and the public interest high (e.g., proposals included relocating the service to another location) then commissioners and Monitor would be able to require a public consultation.
74. This option carries potential risks:
 - it creates uncertainty for providers and the health special administrator surrounding whether a consultation will be required, this may affect their ability to develop effective contingency plans;
 - it creates additional uncertainty for creditors and others with a financial interest in the failed provider;

- there may be political pressure to require a consultation even when the costs are prohibitive and/or it is not justified on a value for money basis; and
 - there may be financial pressure to avoid consultations even when they are justified on a value for money basis.
75. Monitor may mitigate these risks, for example by providing clear guidelines on when a consultation should be required and by Monitor ensuring its independence and ability to make reasoned and rational judgments despite external pressure.
76. Within the consultation document, the Department seeks views on this option and whether specific statutory criteria should be included to inform the decision on whether consultation should be required in a particular case; alternatively this could be addressed through the issuance by Monitor of criteria that involve an assessment of the overall expected net benefits.

Option 3 – Mandatory consultation in cases where proposals would involve a significant variation in the provision of NHS services

77. The starting point in the draft regulations is to include a requirement for public consultation where continuity proposals would involve a significant variation in healthcare services provided as part of the NHS.
78. The consultation process would be similar to the requirements to consult where a trust special administrator is appointed to an NHS foundation trusts.
79. Consultation would not be mandatory in every case where a company enters HSA but would be required where the health special administrator's proposals (as agreed with commissioners and Monitor) would involve a significant service reconfiguration which, for example, may be the case where service continuity is to be achieved through the transfer of NHS services to one or more alternative providers.
80. The benefits of this option would be:
- consultations are targeted to occur where significant service redesign is proposed. This ensures that where the public and patients may be significantly affected by the proposals they have an opportunity to input into the decision making process; and
 - equitable treatment of all services whether they are provided by public or private providers. Since the requirement mirrors the requirements of the foundation trust regime it will ensure that patients, public and commissioners are treated equitably irrespective of who provides their service.
81. The main costs and risks of this option are:
- the meaning of 'significant variation' may be open to interpretation;
 - this may set a low threshold which obliges consultation in cases where the costs of consultation are high relative to the extent of public interest in the continuity plans;
 - this may set a high threshold which does not ensure a consultation in cases where the costs of the consultation are low relative to the extent of public interest in the continuity plans; and
 - this may reduce the scope for prompt action to minimise costs since it does not offer any discretion (particularly compared to option 2).
82. The consultation document seeks views on the suitability of this criterion, whether any other criteria may be appropriate and whether additional flexibility may be required to balance the public interest in service change with the costs and risks associated with consultation in a particular case.

Option 4 – Mandatory consultation in all cases

83. This option would require the health special administrator to hold a mandatory consultation on plans for ensuring service continuity.
84. The benefits of this would be:
- full public and patient engagement and an opportunity for their needs to be reflected in service redesign;
 - better opportunity for errors, omissions and other issues in reorganisation plans to be noticed and addressed; and
 - obtaining additional information to determine which is the best option, both for patients and those with a financial interest in the outcome.
85. However this would also have significant financial costs, particularly where funding was required to ensure the continuity of loss-making activities during the consultation period:
- £0.53 - 13.6 million costs per incident implying a reduction in Quality Adjusted Life Years delivered by the NHS (Annex A).
 - Potentially additional financial costs due to ongoing losses incurred during the consultation period which the health special administrator might be unable to rectify until the consultation was complete.
 - A further source of costs associated with delay is the loss to the value of the business consequent upon any loss of staff or contractual relations due to continued uncertainty.
86. Overall, while this option may provide benefits to users of NHS services where a provider fails, it potentially imposes a greater burden on the financial assistance mechanisms and therefore additional costs on those required to contribute to that fund.
87. There is also a potential for high cost - low benefit consultations (for example, where there is only one viable option) to occur which would be an inefficient use of funds.
88. In the view of the Department, mandatory consultations would not represent an effective use of NHS resources and may be an unnecessary expense. They would commit health special administrators to carry out a consultation even when the costs were prohibitively high or the continuity proposals involved minimal service reconfiguration.

Conclusion and Preferred Option

The Department is consulting on Options 2 and 3 and seeks views on whether a compromise between those may produce an appropriate balance between the public interest in service change and the costs associated with consultation.

Section B: Publicity requirements for companies in HSA

89. In an 'ordinary' administration, the administrator is obliged to publicise his or her appointment to ensure that all those doing business with the company are aware that it is in administration. As part of those requirements, all 'business documents', as defined in the insolvency legislation, must include a notice that the company is in administration and provide the administrator's details.
90. Given the significant amount of paperwork that a healthcare provider generates, the consultation invites views on whether the definition of 'business document' should be amended for the purposes of HSA. For example, it may be desirable to exclude prescriptions since it would be costly, and possibly of little or no benefit, to amend every prescription to provide details of the health special administrator.
91. The options considered for analysis under this section are:
- **Option 1 - apply the definition of 'business document' in the Insolvency Act 1986, or**
 - **Option 2 - exempt certain 'healthcare specific' documents from the definition of 'business document'.**

92. Option 1 would be familiar to the health special administrator as this would be consistent with the underlying legislation and would involve no change. There could, however, be significant monetary costs associated with reprinting or otherwise altering certain documents, which may be of little benefit where the financial status of the company is irrelevant to a particular document or the failure is anyway public knowledge.
93. The main benefit of option 2, tailoring these provisions to the healthcare sector, would be to reduce the monetary costs associated with reprinting or otherwise altering certain documents. The costs of this may be reduced knowledge of the appointment of a health special administrator, but in any case the failure of a healthcare provider is likely to be well publicised (through other requirements in the legislation to advertise HSA and general media reporting of a provider failure).

The draft regulations do not make any specific changes around these publicity requirements but the Department invites views in the consultation as to whether any amendments might be desirable in light of the comments above.

Section C: Providing a route from HSA to ‘ordinary’ administration

94. Administration is a flexible procedure and provides for a number of exit routes, including a way to move a company from administration to liquidation to distribute assets to creditors.
95. Given the unique objective of HSA, the restrictions imposed on the normal rights of creditors and the specific funding mechanisms, HSA should be brought to an end as soon as the continuity of service objective has been achieved.
96. The draft HSA regulations therefore include the various exit routes that are available in ‘ordinary’ administration. In addition, to ensure flexibility to produce the best result for creditors, the draft regulations allow a health special administrator, with Monitor’s consent (this is required as a safeguard to ensure that the objective of HSA has been achieved) to apply to the court for the making of an ‘ordinary’ administration order.
97. As a company might be supplying NHS services alongside other business activities, this flexibility may produce the best outcome for the provider and its creditors. Where, for example, the objective of HSA has been achieved through the transfer of NHS services, moving the company to ‘ordinary’ administration may facilitate a rescue of the remaining business or may produce a better outcome for creditors than an immediate liquidation.
98. The inclusion of this additional exit route is consistent with the requirements in the 2012 Act for the health special administrator to act, so far as is consistent with achieving the service continuity objective of HSA, to protect the interests of the provider’s creditors as a whole (and subject to those interests, to protect the interest of the company’s members)¹⁵.
99. The health special administrator would only be able to take such action where this was in the interests of the company’s creditors; for example, where administration would enable a going concern rescue or would produce better returns to creditors compared to an immediate winding up. When making an application to court, the health special administrator would have to fulfil all the normal legislative requirements associated with an application for administration order and, as in any other case, it would be at the court’s discretion whether to make an administration order.
100. Arguably, there may be other provisions in the insolvency legislation that would enable a health special administrator to take such action but the regulations put this beyond any doubt.
101. While there may be some additional costs associated with an application to the court for an ‘ordinary’ administration order, these would be minor in the overall context of the costs of HSA and also in relation to the benefits to creditors where administration would produce a better outcome than a liquidation.
102. Including this option offers the following benefits:
 - greater flexibility in exiting HSA and potentially better returns to creditors than moving the company to liquidation; and

¹⁵ Sections 128(6)(c) and (d) of the Health and Social Care Act 2012.

- a better chance to rescue either all or part of the business as a going concern, thereby preserving economic value and protecting jobs.

103. The costs of moving to 'ordinary' administration will vary on a case-by-case basis depending on the complexity of the company's affairs to be set out in the application to court. The court fee for an administration application is £175, but estimated total costs could be in the region of £2,500 to £5,000 including the costs of drafting the application and supporting documents, legal fees, and costs associated with the service of documents.
104. The costs could be higher in some circumstances, for example, where the application for an order is contested. The optional nature of this process, however, means that the health special administrator would consider factors on a case-by-case basis and would only seek to move the company to 'ordinary' administration where the purpose of administration, which is generally either to rescue the company as a going concern or to achieve a better result for creditors than an immediate winding up, could be achieved.

For flexibility, the Department recommends this proposal and the consultation on the draft HSA regulations invites views on whether it should be possible to move a company from HSA to 'ordinary' administration.

Rationale and evidence that justify the level of analysis used in the impact assessment (proportionality approach);

105. The level of analysis within this impact assessment is proportionate to the policy under consideration.
106. The level of interest and sensitivity surrounding this policy is potentially significant. The Department will engage with all stakeholders and interested parties during the public consultation, with a view to obtaining a greater evidence base to support this proposal. Information will be collected and on both quantitative and qualitative data. We envisage that the public consultation will provide the Department with a greater insight.
107. The Department will consider views expressed and consider these before a final policy is decided.
108. We are unable to analyse fully the impacts on providers. This is a new process and there is uncertainty surrounding the frequency and scale of this potential impact. However, we envisage that HSA will be a rare occurrence. This is a complex environment and we envisage that Monitor will provide greater clarity through their consultation on the continuity of service regime, guidance on commissioner requested services and on the order in which payments back to the risk pool will sit with regard to the company's creditors.
109. Therefore, we believe a minimum level of analysis is required at this stage. We have provided a description of who is likely to be affected by this policy, namely companies falling within the definition of a 'relevant provider'¹⁶. We have stated a full description of the impacts under each option clearly set out the advantages and disadvantages for each.
110. A discussion of second order effects on investment is provided in Annex B, this has not been included in the impact assessment as the effects are uncertain and Monitor will separately consult on proposals to mitigate these effects.
111. No quantification of the benefits or the monetising the effect is given in this analysis. As stated above, this would be difficult to conduct given the level of uncertainty and data available.

Direct costs and benefits to business calculations (following OIOO methodology);

112. This impact assessment is concerned with the costs of the regulations resulting from the introduction of the HSA procedure for companies supplying NHS-services.
113. We do not believe that OIOO is assessable for this impact assessment as the bearer of the costs is not confirmed. The overall impact of the HSA regime and associated costs will be determined by Monitor. Monitor will produce an impact assessment on the operation of the risk pool, including a

¹⁶ Section 128(9) of the Health and Social Care Act 2012.

determination of where costs are borne. The Department expects that Monitor will act appropriately to mitigate risks for creditors as discussed in Annex B.

114. While this impact assessment can consider the overall costs of the HSA regime, it is unable to assess the impact on business distinct from the wider public sector as this is a matter for Monitor to determine.

Health Impact Assessment

<p>Will the proposal have a direct impact on health, mental health and wellbeing? For example, would it cause ill health, affecting social inclusion, independence and participation? You should consider whether any socioeconomic or equalities groups* will be particularly affected.</p>	<p>Introducing the regulations would not directly impact on health, mental health and wellbeing as HSA could only be used if a company providing certain NHS services fails, and HSA would ensure the continuity of those services in line with commissioners' requirements. When determining which NHS services must be protected, commissioners must assess the health and inequalities impacts of their decisions.</p>
<p>Will the policy have an impact on social, economic and environmental living conditions that would indirectly affect health? For example, would it affect housing, transport, child development, education, good employment opportunities, green space or climate change? You should consider whether any socioeconomic or equalities groups* will be particularly affected.</p>	<p>No – see above explanation.</p>
<p>Will the proposal affect an individual's ability to improve their own health and wellbeing? For example, will it affect their ability to be physically active, choose healthy food, reduce drinking and smoking? You should consider whether any socioeconomic or equalities groups* will be particularly affected.</p>	<p>No – see above explanation.</p>
<p>Will there be a change in demand for or access to health and social care services? For example: Primary Care, Hospital Care, Community Services, Mental Health and Social Services? You should consider whether any socioeconomic or equalities groups* will be particularly affected.</p>	<p>No – commissioners will be responsible for securing continued access to NHS services. Where there are alternative providers, they should have contingency plans in place to replace any lost capacity. If there were not any alternative providers, then these services would be subject to proactive regulation from Monitor in order to secure continued access.</p>
<p>Will the proposal have an impact on global health?</p>	<p>No – continuity of service framework limited to NHS services in England.</p>

*Equalities groups such as race, gender, health, disability, sexual orientation, age, religion or belief.

Competition and small firms impact

115. The emphasis of the HSA regime is on ensuring continuity of access to NHS services rather than supporting individual providers. The objective of HSA may be achieved through rescuing a failed provider as a going concern and/or the transfer of services to alternative providers.
116. In keeping with insolvency policy generally, rescue as a going concern would be prioritised as this should lead to the best outcome for patients and creditors, and more generally would preserve economic value and jobs. However, the regime is flexible and the continuity of services could be ensured through transfers to alternative providers (including new entrants); for example, where a rescue was not feasible or where transfers would produce a better outcome for creditors. Where

the continuity objective was achieved through transfers, the remainder of the company's business may be subject to ordinary insolvency procedures such as administration or liquidation, whichever would produce the best result for creditors as a whole.

117. Introducing a HSA regime for companies providing NHS services may promote competition as commissioners would be assured that there are arrangements in place to ensure service continuity if a provider fails. This means that commissioners would generally be indifferent between using private or NHS providers and would support the creation of a level playing field.
118. Licensing obligations and requirements to contribute to the special funding arrangements for ensuring the continuity of services may affect competition but those areas are distinct from these regulations. The impact assessment published alongside the Health and Social Care Bill assessed the impact of the wider sector regulation policy, including licensing and the continuity of services framework.

Micro organisations

119. In line with commitments to reduce the regulatory burden on micro business, it is not expected that the HSA procedure will apply to micro-businesses. This is because such organisations are unlikely to be subject to the continuity of service framework set out in the 2012 Act.
120. However, these organisations are not exempt in principle since if they are identified by a commissioner as providing an essential NHS service they will require an appropriate licence.
121. This ensures that the continuity of service framework, including HSA, can respond to unique circumstances where the interests of patients may be at risk. For example, the continuity of services framework may be relevant to providers of any size that operate in remote locations.

Annex A: Opportunity Costs of NHS Spending

122. Some of the costs considered in this impact assessment may indirectly fall upon the NHS where the costs of funding service continuity are met by the financial assistance mechanisms to be established by Monitor. Given the budget constraints faced by the NHS, DH and the Exchequer, it is important to account for the value forgone when reallocating resources away from alternative uses, i.e. the “opportunity cost”.
123. The opportunity cost of reduced NHS spending is a reduction in the QALYS (Quality Adjusted Life Years) that the NHS delivers. This implies lower healthcare outcomes for patients when resources are diverted away from healthcare spending.¹⁷

Annex B: Rights of Creditors and Impact on Investment Costs

124. Special administration regimes can represent a significant change to the normal rights of creditors under the insolvency legislation. In particular, the ability of creditors to commence ordinary insolvency proceedings (administration and liquidation) and to take steps to enforce security (where debts are secured against the company’s assets) are constrained.
125. These impacts, combined with the objective of special administration regimes in ensuring continuity of essential services, could lead to lower returns to creditors relative to ordinary insolvency. If a special administration regime results in creditors expecting a lower return if a provider fails, and/or greater difficulty in enforcing security over debts, this may result in increased investment costs for companies subject to the regime.
126. Risk pool funding would be provided in HSA to meet the additional costs of ensuring the continuity of NHS services, this would include the costs associated with public consultation on continuity plans (which would not be incurred in an ordinary insolvency or other special administration regimes).
127. The risk pool will be funded by a levy collected from providers (and perhaps commissioners) and the methodology will be determined by Monitor which will run a separate consultation, including an impact assessment. The operation of the risk pool, and its potential impacts, are therefore not assessed in this impact assessment.
128. While the operation of the risk pool will be determined by Monitor, the Department expects that, as a matter of principle, risk pool funding should operate in a way that ensures that creditors are made no better or worse off as a result of HSA than in an ‘ordinary’ administration.

¹⁷ <http://www.nice.org.uk/newsroom/features/measuringeffectivenessandcosteffectivenesswithqaly.jsp>.