

28 February 2013

Gateway number 18806

**To all direct third party trade creditors and
suppliers of NHS Trusts and Foundation Trusts**

Richmond House
79 Whitehall
London SW1A 2NS
Tel: 020 7210 4878

Richard.Douglas@dh.gsi.gov.uk

Dear Sirs,

NHS trust and NHS foundation trust special administration – a guide for unsecured creditors

This letter provides guidance to unsecured creditors on their rights under special administration for NHS trusts and NHS foundation trusts and how these rights can be exercised. It relates only to NHS trusts and to NHS foundation trusts in England, and is not an exhaustive statement of the relevant law.

Which type of trust does this guide relate to?

The guidance in this note relates to NHS trusts in England and to NHS foundation trusts (FTs). The two types of trust are subject to different legislative provisions. FTs have greater autonomy, not being subject to Secretary of State direction in the way that NHS trusts are.

In what circumstances could an NHS trust find itself in special administration?

An example of circumstances which could result in an NHS Trust being put into special administration is where the Trust faces financial challenges which are simply too severe to turn around by providing short-term financial support. This would perpetuate lower quality services and represent poor value for money for the taxpayer. In these cases, the Department will not provide additional financial support outside the special administration process.

The Secretary of State may trigger the regime for NHS Trusts, on the advice of the National Trust Development Agency, where he considers this to be in the interests of the health service. Before doing so the Secretary of State is required by statute to consult the trust, relevant commissioners of the trust's services and, prior to 1st April 2013 when Strategic Health Authorities (SHAs) are to be abolished, any SHA in whose area the trust has hospitals, establishments or facilities. If, after consultation, the Secretary of State decides to enact the Unsustainable Provider Regime (UPR) at a trust, a trust special

administrator (TSA) would be appointed by the Secretary of State and would assume full control of the trust, replacing the functions of the trust board.

The National Health Service Act 2006 (the 2006 Act) sets challenging milestones for a TSA, and for the Secretary of State to make a final decision in relation to an NHS trust subject to the UPR within a usual maximum period of 120 working days from the date a UPR commences. The Secretary of State has power to extend this timeframe in specified circumstances.

In what circumstances does an NHS foundation trust find itself in special administration?

The appointment of a TSA is one way in which Monitor can take decisive action to deal with NHS foundation trusts that are either unsustainable in their current configuration or at serious risk of failing to deliver sustainable services. The 2006 Act (as amended by the 2012 Act) provides a power for Monitor to appoint a TSA to an NHS foundation trust if Monitor considers that doing so would be appropriate in the context of the foundation trust's ability to pay its debts.

The Failure Regime for Unsustainable NHS Providers as set out in Chapter 5A of the 2006 Act (the failure regime) and which applies to an FT, differs from the one that applies to NHS trusts to reflect the greater autonomy of FTs. Monitor will trigger the formal special administration regime for FTs by appointing a TSA where it is satisfied that the FT is, or is likely to become, unable to pay its debts.

Before triggering the regime, Monitor is required by statute to consult first the Secretary of State and then the FT, the NHS Commissioning Board, the Care Quality Commission and relevant commissioners. If, after consultation, Monitor decides to enact the failure regime, Trust Special Administrators would be appointed by Monitor who would assume full control of the FT, replacing the functions of the FT board.

The 2006 Act sets challenging milestones for a TSA appointed to an FT, and for the Secretary of State to make a final decision as to whether to use the veto within a usual maximum period of 150 working days from the date the TSA is appointed. Monitor has power to extend this timeframe in exceptional circumstances.

What is the purpose of administration?

Administration under NHS legislation is not the same as an administration under insolvency legislation. The purpose of administration under NHS legislation is to ensure the continued delivery of patient services, and for an FT, in accordance with commissioners' specifications. The TSA is required to make recommendations in a final report to the Secretary of State (or to Monitor if it is in relation to an FT) about the action that should be taken in relation to the trust, which will need to ensure the delivery of clinically and financially viable patient services.

What are the powers of a TSA?

A TSA's powers are very broad. In addition to the TSA's functions of making recommendations about the action that should be taken in relation to the trust or FT in a draft report (on which consultation must take place) and then a final report, the TSA exercises all the powers of the trust or FT's board. This includes powers to carry on the trust's or FT's business. The TSA replaces a trust's board of directors (and council of governors, if it is in relation to an FT) and carries out their functions instead.

What are the possible outcomes when a trust is put into administration?

An NHS trust or an FT in administration could be merged with, or acquired by, another trust, it could develop a sustainable business plan and come out of administration, or it could be dissolved.

Is the Secretary of State liable for all the liabilities of a dissolved NHS trust?

The Secretary of State has an obligation to deal with all of the liabilities of any NHS trust that is dissolved. Section 70 of the 2006 Act places a duty on the Secretary of State to transfer all of a dissolved NHS trust's liabilities to another NHS body, to the Secretary of State, or to Welsh Ministers. This means that all creditors of an NHS trust are protected and all liabilities of all NHS trusts are safeguarded.

Is the Secretary of State responsible for all the liabilities of a dissolved FT?

In the event that a decision is made at the conclusion of the failure regime to dissolve an FT, Monitor is to make an order under Section 65LA of the 2006 Act, which will dissolve the FT. This order must provide for the transfer of all of the FT's liabilities to another FT or to Secretary of State. or between another FT and the Secretary of State. This means that all creditors of an FT are protected and all liabilities of all FTs are safeguarded.

Do the regimes mean that in all cases 100% of any due debt/liability will be met according to current terms of business with suppliers and there are no circumstances in which creditors might be offered anything less than this?

The appointment of the TSA does not affect any contractual obligations that the trust or FT owes to third parties. If a trust or FT is under a contractual obligation prior to the appointment of the TSA, it will continue to be after that appointment. As stated above, section 70 of the 2006 Act places a duty on the Secretary of State to deal with all the liabilities of any NHS trust that is dissolved and an order made by Monitor under section 65LA of the 2006 Act will transfer all liabilities of an FT that is dissolved to another FT or the Secretary of State.

NHS legislation does not impose a duty on the TSA to meet debts according to current terms of business with suppliers. Our expectation is that a TSA will strive to deal with debts in accordance with current terms of business.

Suppliers will need to decide for themselves the terms on which to do new business with an NHS trust or FT in the UPR regime. However, an NHS trust or FT to which a TSA has been appointed remains covered by the section 70 obligations (in relation to NHS trusts) or section 65LA obligations (in relation to FTs), which have the effect of safeguarding all liabilities.

How does administration come to an end?

NHS trusts:

The purpose of the UPR is to produce a quick viable solution to the problems facing unsustainable services. The 2006 Act imposes a timetable on the TSA. It is for the Secretary of State, after final recommendations from the TSA, to make a final decision about an NHS trust within a usual maximum period of 120 working days from the date a UPR commences. There are powers within the 2006 Act for the Secretary of State to extend the time available to the TSA by means of order. Extensions to the timetable will be exceptional. Once the final decision is made, the administration will come to an end either by the Secretary of State making an order specifying a date when the TSA's appointment, and the suspension of the chairman and directors of the trust, is to end (if the trust is not to be dissolved) or by means of the order made by the Secretary of State to dissolve the trust and transfer its property and liabilities (where it is to be dissolved).

FTs:

The objective of the FT regime is set out in section 65DA of the 2006 Act, which states that the TSA must secure continuity of services, according to commissioners' specifications. For an FT to leave administration, Monitor must decide that this objective has been met and that the TSA had carried out his administration duties, and the Secretary of State must have decided he is satisfied as to various specified matters. Alternatively, if the Secretary of State is not satisfied as to various specified matters, then he must decide what action to take in relation to the trust under section 65KD(9). Once either of the above has occurred and the decision is not to dissolve the FT, then Monitor must make an order specifying the date when the appointment of the TSA and the suspension of the chairman, directors and the governors of the FT comes to an end. If the decision is to dissolve the FT, then the administration comes to an end by means of the order Monitor will make to dissolve the FT and transfer its property and liabilities.

What information is an unsecured creditor entitled to?

There is nothing in NHS legislation about notifying creditors. The TSA may consider it appropriate to notify all known creditors of his or her appointment as soon as reasonably practicable. There is no requirement for the TSA to hold a meeting of creditors as all liabilities will be paid in full. The TSA will use his or her judgement on how best to keep creditors informed.

Can the unsecured creditors form a creditors' committee?

There is no provision in NHS legislation for formation of a creditors' committee.

How is the administrator's fee determined?

The Secretary of State has powers to pay the TSA's remuneration and expenses for TSAs appointed to NHS trusts (and sets the level of these as part of the terms of appointment) and Monitor has the power to pay the TSA's remuneration and expenses for TSAs appointed to FTs.

In relation to FTs only, section 134 of the Health and Social Care Act 2012 provides for Monitor to establish financial mechanisms to fund the costs of the FT regime, including the TSA's remuneration and expenses. This mechanism will not be in place until April 2015, at the earliest, and so the position outlined in the previous paragraph applies prior to that date.

There will be no reduction in the amounts due to creditors to finance the TSA's fees or expenses.

What examples are there of the UPR process being used to resolve the problems at a trust?

The appointment of a TSA to South London Healthcare NHS trust on 16 July 2012 was the first use of the UPR powers. The 2006 Act sets challenging milestones for a TSA, and for the Secretary of State to make a final decision about an NHS trust, within a usual maximum period of 120 working days from the date a UPR commences. In the case for South London Healthcare NHS trust, the Secretary of State used his powers to extend the overall timeframe by 30 working days. The Secretary of State took his final decision in relation to the trust on 31st January 2013.

Details of the Secretary of State's decision, and the TSA's draft and final reports can be found at <http://www.dh.gov.uk/health/tag/trust-special-administrator/>

I hope that this letter provides the necessary reassurance

Yours faithfully,

A handwritten signature in black ink that reads "Richard Douglas". The signature is written in a cursive, slightly slanted style.

RICHARD DOUGLAS CB
Director-General Strategy, Finance & NHS, DH
Head of the Government Finance Profession, HM Treasury