



## NHS trust and foundation trust special administration - a guide for unsecured creditors

To all direct third party trade creditors and suppliers of NHS trusts and NHS foundation trusts

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This document provides guidance to unsecured creditors on their rights under special administration for NHS trusts and NHS foundation trusts. It is not an exhaustive statement of the relevant law.

The guidance has been updated to reflect recent Acts (Care Act 2014 and Deregulation Act 2015) which have strengthened the Trust Special Administrator's Regime. However, the fundamental principles in relation to creditors' rights remain unchanged.

The Trust Special Administrator's regime (referred to below as the TSA Regime) was introduced by the Health Act 2009 and set out under Chapter 5A of the National Health Service Act 2006 (the 2006 Act). Amendments were made by the Health and Social Care Act 2012 (the 2012 Act) to extend the scope of the regime to include NHS foundation trusts for whom the regime follows a slightly different legal process to NHS trusts.

The TSA Regime is a bespoke, time-limited and last resort measure to provide a solution to intractable problems in NHS trusts or NHS foundation trusts facing significant challenges, whether for clinical and/or financial reasons. The TSA Regime introduced the role of Trust Special Administrator who would take over the failed trust with a dual role of running it and making recommendations for a sustainable long-term solution for its services.

Further amendments to the TSA Regime were made by the Care Act 2014 (the 2014 Act) to help deliver an effective regime and greater local input. The changes are detailed in statutory guidance from the Secretary of State and Monitor (refer to question 15).

## **1. Which type of trust does this guide relate to?**

The guidance in this letter relates to NHS trusts in England and to NHS foundation trusts (FTs). Although the TSA Regime for the two types of trust are similar, there are some differences. However, provisions in the 2014 Act have brought about more alignment between the regimes of both trust types.

## **2. In what circumstances could an NHS trust find itself in special administration and what would this entail?**

An example of circumstances which could result in an NHS trust being put into the TSA Regime is where the trust faces financial challenges which are too severe to turn around by providing short-term financial support. This would risk or perpetuate lower quality services and represent poor value for money for the taxpayer.

The legislation gives the Secretary of State the power to trigger the regime for NHS Trusts, and he may do so on the recommendation of the National Trust Development Authority (NHS TDA), where he considers this to be in the interests of the health service. This could include situations of serious failure in financial performance or quality of care, or a combination of both.

Before using the regime, the Secretary of State must consult the NHS trust and those of its commissioners which he considers it appropriate to consult. The Secretary of State may also choose to consult others such as the Care Quality Commission and NHS England.

If, after consultation, the Secretary of State decides to trigger the TSA Regime, a Trust Special Administrator would be appointed by the Secretary of State and would assume full control of the trust, replacing the functions of the trust board (the board members would be legally suspended from their board governance responsibilities). The duty of a TSA is two-fold:

- to be responsible, during the period of his or her appointment, for the provision of all services offered by the NHS trust; and,
- to produce recommendations in a report to the Secretary of State about actions to secure into the future the delivery of quality, safe and financially sustainable essential services of the NHS Trust in administration in that health economy.

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 in administration following the TSA's recommendations within an expected maximum period of 146 working days from the date

on which the TSA's appointment takes effect. The Secretary of State has power to extend this timeframe at various stages in the process if he thinks it would be unreasonable in the circumstances to expect the TSA to complete the relevant activities within the statutory timeframe.

### **3. In what circumstances could a foundation trust find itself in special administration and what would this entail?**

The 2006 Act (as amended by the 2012 Act) gives Monitor the power to appoint a TSA to an FT if it satisfied that the trust is, or is likely to become, unable to pay its debt as and when they are due. Provisions in the 2014 Act also allow Monitor to trigger the regime where there is a serious failure by the FT to provide services of sufficient quality, and for the Care Quality Commission to require Monitor to trigger the regime in such circumstances.

Prior to triggering the regime, Monitor must as a minimum consult the Secretary of State, the FT and those of its commissioners which Monitor considers it is appropriate to consult, the Care Quality Commission and NHS England.

If, after consultation, Monitor decides to enact the TSA Regime, a Trust Special Administrator would be appointed by Monitor. As with an NHS Trust, the TSA has a dual role. He or she would assume full control of the FT, replacing the functions of the FT board (all members of the board would be legally suspended from their board governance responsibilities and governors would be suspended too). He or she must also make recommendations in a report to Monitor about actions to secure into the future the delivery of quality, safe and financially sustainable essential services of the FT in administration in that health economy.

The TSA's final report is sent to Monitor which decides whether to accept the recommendations. If the recommendations are accepted, the Secretary of State can either accept them or veto them. The ability to veto the recommendations is based on the restricted grounds of specified statutory tests which reflect the interests of patients and the taxpayer.

The expected timeframe for the application of the TSA Regime at an FT is 176 working days from the date on which the TSA's appointment takes effect. Monitor has power to extend this timeframe at various stages in the process if it thinks it would be unreasonable in the circumstances to expect the TSA to complete the relevant activities within the statutory timeframe.

#### **4. What is the purpose of trust special administration?**

The objective of the TSA Regime is to protect patients from failing NHS services and secure the continued provision of clinically and financially sustainable services which are essential to the local population.

#### **5. What are the possible outcomes when an NHS trust or foundation trust is put into administration?**

An NHS trust or an FT in special administration could develop a sustainable business plan and come out of administration, or it could be dissolved and have its services, staff and liabilities transferred to another NHS body.

#### **6. 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 an NHS trust that is dissolved at the conclusion of the TSA Regime<sup>1</sup>. 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.

#### **7. Is the Secretary of State liable for all the liabilities of a dissolved foundation trust?**

In the event that a decision is made at the conclusion of the TSA Regime to dissolve an FT, Monitor must make an order under Section 65LA of the 2006 Act to dissolve that FT. The order must provide for the transfer of all of the FT's liabilities to another NHS body, to the Secretary of State, between more than one NHS body or between one or more NHS bodies and the Secretary of State. This means that all creditors of an FT are protected and all liabilities of all FTs are safeguarded.

#### **8. Does the TSA Regime 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 NHS trust or FT owes to third parties. If an NHS 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 under question 6, 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

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<sup>1</sup> This excludes criminal liabilities although the expectation is that these would be transferred.

section 65LA of the 2006 Act will transfer all liabilities of an FT that is dissolved as set out under question 7.

NHS legislation does not impose a duty on a 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 under trust special administration. 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.

## **9. How does trust special administration come to an end?**

### **NHS trusts:**

The purpose of the TSA Regime 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 the expected maximum period of 146 working days from the date on which the TSA's appointment comes into effect. There are powers within the 2006 Act for the Secretary of State to extend the time available to the TSA by means of order. 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).

### **NHS foundation trusts:**

The objective of the TSA Regime as applied to an FT is set out in section 65DA of the 2006 Act, which states that the TSA must secure the continuity of essential 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 or her administration duties, and the Secretary of State must have decided he is satisfied as to various specified matters set out in statutory tests which reflect the interests of the patients and taxpayer. Alternatively, if the Secretary of State is not satisfied as to these specified matters, the legislation gives him the power ultimately to decide what action to take in relation to the FT under section 65KD(9) of the 2006 Act. 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, is to 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.

#### **10. What information is an unsecured creditor entitled to?**

There is nothing in the NHS legislative framework governing the TSA Regime 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 are expected to be paid in full. The TSA will use his or her judgement on how best to keep creditors informed.

#### **11. Can the unsecured creditors form a creditors' committee?**

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

#### **12. How is a TSA'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 TSA's terms of appointment). Monitor has the power to pay the TSA's remuneration and expenses for TSAs appointed to FTs. There will be no reduction in the amounts relating to the value of liabilities including due to creditors to finance the TSA's fees or expenses.

#### **13. If the TSA's recommendations are accepted, what financial support is available to help implement them or other decisions?**

The ability of the Secretary of State to provide finance to NHS trusts and FTs is set out in Secretary of State's Guidance under section 42A of the National Health Service Act 2006. This includes the ability of the Secretary of State to provide finance to help implement a TSA's report. The guidance is available at:

<https://www.gov.uk/government/publications/guidance-on-financing-available-to-nhs-trusts-and-foundation-trusts>

When making recommendations to address quality or financial failure, the TSA should ensure that, if the solution necessitates financial support, he or she considers all rules based financing in the above mentioned guidance and considers other relevant guidance such as "NHS providers and commissioners: submit locally determined prices to Monitor" by Monitor and NHS England available at:

<http://www.gov.uk/nhs-providers-and-commissioners-submit-locally-determined-prices-to-monitor>

#### **14. How many times has the TSA Regime been used?**

Since the TSA Regime was introduced in 2009, it has been used twice in South London in 2012 and in Mid-Staffordshire in 2013.

The first use of the regime was triggered in July 2012 at South London Healthcare NHS Trust. In early 2013, the Secretary of State announced his decision to accept the broad recommendations of the TSA. This included the dissolution of the NHS Trust and the transfer of its hospitals and other assets, and staff to a mixture of neighbouring NHS Trusts and FTs which happened in October 2013.

The second use of the regime was in March 2013 at Mid-Staffordshire NHS Foundation Trust. The decision by Monitor and the Secretary of State to accept the TSAs' recommendations included the decision to dissolve the FT and transfer its hospitals and other assets and staff to two neighbouring NHS trusts.

#### **15. Where can I obtain more information about the TSA Regime?**

The Secretary of State and Monitor have published statutory guidance to TSAs appointed to NHS Trusts and FTs respectively. These are available at:

<https://www.gov.uk/government/publications/statutory-guidance-for-trust-special-administrators-appointed-to-nhs-trusts>

<https://www.gov.uk/government/publications/trust-special-administrators-of-nhs-foundation-trusts-statutory-guide>

#### **Contact details**

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