



# National Health Service Act 2006

## 2006 CHAPTER 41

### PART 2

#### HEALTH SERVICE BODIES

### CHAPTER 5

#### NHS FOUNDATION TRUSTS

##### *Introductory*

#### **30 NHS foundation trusts**

- (1) An NHS foundation trust is a public benefit corporation which is authorised under this Chapter to provide goods and services for the purposes of the health service in England.
- (2) A public benefit corporation is a body corporate which, in pursuance of an application under this Chapter, is constituted in accordance with Schedule 7.

#### **31 Independent Regulator of NHS Foundation Trusts**

- (1) There continues to be a body corporate known as the Independent Regulator of NHS Foundation Trusts (referred to in this Act as “the regulator”).
- (2) Schedule 8 makes further provision about the regulator.

#### **32 General duty of regulator**

The regulator must exercise its functions in a manner consistent with the performance by the Secretary of State of his duties under sections 1, 3 and 258.

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*Status: Point in time view as at 27/03/2012.*

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## *Authorisation*

### **33 Applications by NHS trusts**

- (1) An NHS trust may make an application to the regulator for authorisation to become an NHS foundation trust, if the application is supported by the Secretary of State.
- (2) The application must—
  - (a) describe the goods and services which the applicant proposes should be provided by the NHS foundation trust, and
  - (b) be accompanied by a copy of the proposed constitution of the NHS foundation trust,
 and must give any further information which the regulator requires the applicant to give.
- (3) The applicant may modify the application with the agreement of the regulator at any time before authorisation is given under section 35.
- (4) Once an NHS trust has made the application—
  - (a) the provisions of the proposed constitution which give effect to paragraphs 3 to 19 of Schedule 7 have effect, but only for the purpose of establishing the initial membership of the NHS foundation trust and of the board of governors, and the initial directors, and enabling the board of governors and board of directors to make preparations for the performance of their functions,
  - (b) the NHS trust may do anything (including the things mentioned in paragraph 14 of Schedule 4) which appears to it to be necessary or expedient for the purpose of preparing it for NHS foundation trust status.

### **34 Other applications**

- (1) An application may be made to the regulator by persons (other than an NHS trust) to be incorporated as a public benefit corporation and authorised to become an NHS foundation trust, if the application is supported by the Secretary of State.
- (2) The application must—
  - (a) describe the goods and services which the applicants propose should be provided by the NHS foundation trust, and
  - (b) be accompanied by a copy of the proposed constitution of the NHS foundation trust,
 and must give any further information which the regulator requires the applicants to give.
- (3) If it appears to the regulator that—
  - (a) provision of the goods and services described in the application is likely to assist in the performance of the duties mentioned in section 32,
  - (b) the trust as proposed to be constituted will be able to provide those goods and services, and
  - (c) the proposed constitution accords with Schedule 7 and is otherwise appropriate,
 the regulator may issue a certificate of incorporation.

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- (4) The applicants may modify the application with the agreement of the regulator at any time before the certificate is issued.
- (5) On the issue of the certificate, the applicants are incorporated as a public benefit corporation.
- (6) The certificate is conclusive evidence of incorporation.
- (7) Once the certificate has been issued—
  - (a) the proposed constitution has effect, but the applicants may exercise the functions of the corporation on its behalf until a board of directors is appointed in accordance with the constitution,
  - (b) the corporation may do anything (including the things mentioned in section 47) which appears to it to be necessary or expedient for the purpose of preparing it for NHS foundation trust status.

### **35 Authorisation of NHS foundation trusts**

- (1) The regulator may give an authorisation under this section—
  - (a) to an NHS trust which has applied under section 33, or
  - (b) to a public benefit corporation,if the regulator is satisfied as to the following matters.
- (2) The matters are that—
  - (a) the applicant's constitution will be in accordance with Schedule 7 and will otherwise be appropriate,
  - (b) the applicant has taken steps to secure that (taken as a whole) the actual membership of any public constituency, and (if there is one) of the patients' constituency, will be representative of those eligible for such membership,
  - (c) there will be a board of governors, and a board of directors, constituted in accordance with the constitution,
  - (d) the steps necessary to prepare for NHS foundation trust status have been taken,
  - (e) the applicant will be able to provide the goods and services which the authorisation will require it to provide, and
  - (f) any other requirements which the regulator considers appropriate are met.
- (3) In deciding whether it is satisfied as to the matters referred to in subsection (2)(e), the regulator must consider (among other things)—
  - (a) any report or recommendation in respect of the applicant made by [<sup>F1</sup>the Care Quality Commission] ,
  - (b) the financial position of the applicant.
- (4) The authorisation may be given on any terms the regulator considers appropriate.
- (5) The regulator must not give an authorisation unless it is satisfied that the applicant has sought the views about the application of the following—
  - <sup>F2</sup>(a) .....
  - (b) individuals who live in any area specified in the proposed constitution as the area for a public constituency,
  - (c) any local authority that would be authorised by the proposed constitution to appoint a member of the board of governors,

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- (d) if the proposed constitution provides for a patients' constituency, individuals who would be able to apply to become members of that constituency,
  - (e) any prescribed persons.
- (6) If regulations make provision about consultation, the regulator may not give an authorisation unless it is satisfied that the applicant has complied with the regulations.
- (7) The generality of the power in subsection (4) is not affected by the following provisions of this Chapter.

#### Textual Amendments

- F1** Words in s. 35(3)(a) substituted (1.4.2009) by [Health and Social Care Act 2008 \(c. 14\), s. 170\(3\)\(4\), Sch. 5 para. 83](#); S.I. 2009/462, art. 2(1), Sch. 1 para. 35(bb)
- F2** S. 35(5)(a) repealed (1.4.2008) by [Local Government and Public Involvement in Health Act 2007 \(c. 28\), s. 245\(5\), Sch. 18 Pt. 18](#); S.I. 2008/461, art. 2(3), Sch.

### 36 Effect of authorisation

- (1) On an authorisation being given to a body corporate which is an NHS trust—
- (a) it ceases to be an NHS trust and becomes an NHS foundation trust,
  - (b) the proposed constitution has effect, and
  - (c) any order under section 25(1) is revoked.
- (2) On an authorisation being given to a body corporate which is a public benefit corporation, it becomes an NHS foundation trust.
- (3) The authorisation is conclusive evidence that the body in question is an NHS foundation trust.
- (4) Subsections (1) to (3) do not affect the continuity of the body or of its property or liabilities (including its criminal liabilities).
- (5) The validity of any act of an NHS foundation trust is not affected by any vacancy among the directors or by any defect in the appointment of any director.
- (6) An NHS foundation trust must not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and an NHS foundation trust's property must not be regarded as property of, or property held on behalf of, the Crown.

### 37 Amendments of constitution

An NHS foundation trust may make amendments of its constitution with the approval of the regulator.

### 38 Variation of authorisation

- (1) The regulator may vary an authorisation.
- (2) In deciding whether or not to vary an authorisation, the regulator must have regard (among other things) to—

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- (a) any report or recommendation made to it by virtue of section 21(2)(f) of the Local Government Act 2000 (c. 22) (overview and scrutiny committees),
- <sup>F3</sup>(b) .....

**Textual Amendments**

**F3** S. 38(2)(b) repealed (30.6.2008) by [Local Government and Public Involvement in Health Act 2007](#) (c. 28), s. 245(5), [Sch. 18 Pt. 18](#); S.I. 2008/461, art. 4(b)(c)

**39 Register of NHS foundation trusts**

- (1) The regulator must continue to maintain a register of NHS foundation trusts.
- (2) The register must contain in relation to each NHS foundation trust—
  - (a) a copy of the current constitution,
  - (b) a copy of the current authorisation,
  - (c) a copy of the latest annual accounts and of any report of the auditor on them,
  - (d) a copy of the latest annual report,
  - (e) [<sup>F4</sup>a copy of the latest document sent to the regulator under paragraph 27 of Schedule 7 (forward planning), ]
  - (f) a copy of any notice given under section 52 (failing NHS foundation trusts).
- (3) In relation to any time before an NHS foundation trust is first required to send an annual report to the regulator, the register must contain a list of the persons who were first elected or appointed as—
  - (a) the members of the board of governors,
  - (b) the directors.
- (4) Members of the public may inspect the register at any reasonable time.
- (5) Any person who requests it must be provided with a copy of, or extract from, any document contained in the register on payment of a reasonable charge.

**Textual Amendments**

**F4** S. 39(2)(e) omitted (27.3.2012 for specified purposes) by virtue of [Health and Social Care Act 2012](#) (c. 7), [ss. 156\(5\), 306\(1\)\(d\)\(4\)](#)

**[<sup>F5</sup>39A Panel for advising governors**

- (1) The regulator may appoint a panel of persons to which a governor of an NHS foundation trust may refer a question as to whether the trust has failed or is failing—
  - (a) to act in accordance with its constitution, or
  - (b) to act in accordance with provision made by or under this Chapter.
- (2) A governor may refer a question to the panel only if more than half of the members of the council of governors voting approve the referral.
- (3) The panel—
  - (a) may regulate its own procedure, and

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- (b) may establish such procedures, and make such other arrangements, as it considers appropriate for the purpose of determining questions referred to it under this section.
- (4) The panel may decide whether, or to what extent, to carry out an investigation on a question referred to it under this section.
- (5) The panel may for that purpose, or for the purpose of carrying out such an investigation, request information or advice.
- (6) Where the panel has carried out such an investigation, it must publish a report of its determination of the question referred to it.
- (7) If a person refuses to comply with a request made under subsection (5), the report under subsection (6) may refer to the refusal.
- (8) On any proceedings before a court or tribunal relating to a question referred to the panel under this section, the court may take the panel's report of its determination of the question into account.
- (9) The regulator—
  - (a) must pay expenses properly incurred by the panel, and
  - (b) must make administrative support available to the panel.
- (10) Regulations may make provision as to—
  - (a) eligibility for membership of the panel;
  - (b) the number of persons that may be appointed as members;
  - (c) the terms of appointment of members;
  - (d) circumstances in which a person ceases to be a member or may be suspended.]

#### Textual Amendments

- F5** S. 39A inserted (27.3.2012 for specified purposes) by [Health and Social Care Act 2012 \(c. 7\)](#), ss. 162, 306(1)(d)(4)

### *Financial matters*

#### **40 Power of Secretary of State to give financial assistance**

- (1) The Secretary of State may give financial assistance to any NHS foundation trust.
- (2) The financial assistance may be given by way of loan, public dividend capital, grant or other payment.
- (3) The Secretary of State may guarantee the payment of any amount payable by an NHS foundation trust under an externally financed development agreement.
- (4) “Externally financed development agreement” has the same meaning as in paragraph 23 of Schedule 4, reading references in sub-paragraphs (3) and (5) of that paragraph to the NHS trust as references to the NHS foundation trust.

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#### **41 Prudential borrowing code**

- (1) The regulator may revise the code made under section 12(1) of the Health and Social Care (Community Health and Standards) Act 2003 (c. 43) for determining the limit on the total amount of the borrowing of any NHS foundation trust.
- (2) In revising the code the regulator must have regard (among other things) to any generally accepted principles used by financial institutions to determine the amounts of loans to non profit making bodies.
- (3) A body is non profit making if it does not carry on activities for the purpose of making profits for distribution to its members or others.
- (4) Before revising the code, the regulator must consult—
  - (a) the Secretary of State,
  - (b) each NHS foundation trust,
  - (c) each NHS trust intending to make an application to become an NHS foundation trust,
  - (d) such other persons as the regulator considers appropriate.
- (5) The regulator must lay a copy of the revised code before Parliament.

#### **42 Public dividend capital**

- (1) Where an NHS trust becomes an NHS foundation trust, the amount which was the public dividend capital of the NHS trust immediately before the giving of the authorisation continues as public dividend capital of the NHS foundation trust held on the same conditions (“initial public dividend capital”), but subject to this section.
- (2) Any amount issued to an NHS foundation trust as public dividend capital under section 40 is (like initial public dividend capital) an asset of the Consolidated Fund.
- (3) The Secretary of State may, with the consent of the Treasury, decide the terms on which any public dividend capital of an NHS foundation trust must be treated as having been issued.
- (4) But the dividend to be paid by the trust must be the same as that payable by NHS trusts in England under paragraph 1(6) of Schedule 5.
- (5) Before exercising the power in subsection (3), the Secretary of State must consult the regulator.
- (6) Any amount paid to the Secretary of State by an NHS foundation trust by way of repayment of public dividend capital must be paid into the Consolidated Fund.

#### *Functions*

#### **43 Authorised services**

- (1) An authorisation must authorise the NHS foundation trust to provide goods and services for purposes related to the provision of health care.
- (2) But the authorisation must secure that the principal purpose of the NHS foundation trust is the provision of goods and services for the purposes of the health service in England.

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- (3) The NHS foundation trust may also carry on activities other than those mentioned in subsection (1), subject to any restrictions in the authorisation, for the purpose of making additional income available in order better to carry on its principal purpose.
- (4) The authorisation may require the provision, wholly or partly for the purposes of the health service in England, of goods and services by the NHS foundation trust.
- (5) The authorisation must authorise and may require the NHS foundation trust—
- (a) to carry out research in connection with the provision of health care,
  - (b) to make facilities and staff available for the purposes of education, training or research carried on by others,
- and, in deciding how to exercise its functions under this subsection in a case where any of the corporation's hospitals includes a medical or dental school provided by a university, the regulator must have regard to the need to establish and maintain appropriate arrangements within the university.
- (6) In deciding whether or not to require the NHS foundation trust to provide, wholly or partly for the purposes of the health service in England, any goods or services the regulator must have regard (among other things) to—
- (a) the need for the provision of goods or services in the area in question,
  - (b) any provision of goods or services by other health service bodies in the area in question,
  - (c) any other provision by the NHS foundation trust with which the provision of the goods or services is connected,
  - (d) any agreement or arrangement to which the body corporate which is the NHS foundation trust is or was a party.
- (7) Such a requirement as is mentioned in subsection (4) may be framed by reference (among other things) to—
- (a) goods or services in general or of a particular description,
  - (b) goods or services required to meet the needs of health service bodies in general or those of a particular description,
  - (c) goods or services required to meet the needs of other persons of a particular description,
  - (d) the volume of goods or services provided,
  - (e) the place where goods or services are provided,
  - (f) the period within which goods or services are provided.

#### **44 Private health care**

- (1) An authorisation may restrict the provision, for purposes other than those of the health service in England, of goods and services by an NHS foundation trust.
- (2) The power must be exercised, in particular, with a view to securing that the proportion of the total income of an NHS foundation trust which was an NHS trust in any financial year derived from private charges is not greater than [<sup>F6</sup>—
- (a)] the proportion of the total income of the NHS trust derived from such charges in the base financial year<sup>F7</sup>, or
  - (b) in the case of a mental health foundation trust designated under subsection (2A), that proportion or 1.5% if greater.]



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- [<sup>F8</sup>(2A) An authorisation of an NHS foundation trust which was an NHS trust must designate it as a mental health foundation trust for the purposes of this section if it appears to the regulator that it provides goods or services only or mainly for the prevention, diagnosis or treatment of any disorder or disability of the mind or for the benefit in any other way of people suffering from a disorder or disability of the mind.]
- (3) “Base financial year” means the first financial year throughout which the body corporate was an NHS trust or, if it was an NHS trust throughout the financial year ending with 31st March 2003, that year.
- (4) “Private charges” means charges imposed in respect of goods and services provided to patients other than patients being provided with goods and services for the purposes of the health service.
- (5) Section 43(7) applies for the purposes of this section.
- (6) According to the nature of its functions, an NHS foundation trust may, in the case of patients being provided with goods and services for the purposes of the health service, make accommodation or further services available for patients who give undertakings (or for whom undertakings are given) to pay any charges imposed by the NHS foundation trust in respect of the accommodation or services.
- (7) An NHS foundation trust may exercise the power conferred by subsection (6) only to the extent that its exercise does not to any significant extent interfere with the performance by the NHS foundation trust of its functions.

#### Textual Amendments

- F6** Word in s. 44(2) inserted (19.1.2010) by [Health Act 2009 \(c. 21\)](#), **ss. 33(2)(a)**, 40(1); S.I. 2010/30, art. 2(g)
- F7** S. 44(2)(b) and word inserted (19.1.2010) by [Health Act 2009 \(c. 21\)](#), **ss. 33(2)(b)**, 40(1); S.I. 2010/30, art. 2(g)
- F8** S. 44(2A) inserted (19.1.2010) by [Health Act 2009 \(c. 21\)](#), **ss. 33(3)**, 40(1); S.I. 2010/30, art. 2(g)

## 45 Protection of property

- (1) An NHS foundation trust may not dispose of any protected property without the approval of the regulator.
- (2) Disposing of property includes disposing of part of it or granting an interest in it.
- (3) Protected property is property of the trust designated as protected in its authorisation.
- (4) The regulator may designate property as protected if it considers it is needed—
- (a) for the purposes of any goods or services which the authorisation requires the trust to provide wholly or partly for the purposes of the health service in England, or
- (b) for the purpose of doing anything which the trust is required to do under section 43(5).
- (5) The regulator may give approval under subsection (1) on any terms it considers appropriate.
- (6) An NHS foundation trust may not create a floating charge on its property.

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#### **46 Financial powers**

- (1) An NHS foundation trust may borrow money for the purposes of or in connection with its functions.
- (2) But the total amount of the NHS foundation trust's borrowing is subject to the limit imposed by its authorisation.
- (3) The limit must be reviewed annually by the regulator.
- (4) An NHS foundation trust may invest money (other than money held by it as trustee) for the purposes of or in connection with its functions.
- (5) The investment may include investment by—
  - (a) forming, or participating in forming, bodies corporate,
  - (b) otherwise acquiring membership of bodies corporate.
- (6) An NHS foundation trust may give financial assistance (whether by way of loan, guarantee or otherwise) to any person for the purposes of or in connection with its functions.

#### **47 General powers**

- (1) An NHS foundation trust may do anything which appears to it to be necessary or expedient for the purpose of or in connection with its functions.
- (2) In particular it may—
  - (a) acquire and dispose of property,
  - (b) enter into contracts,
  - (c) accept gifts of property (including property to be held on trust for the purposes of the NHS foundation trust or for any purposes relating to the health service),
  - (d) employ staff.
- (3) Any power of the NHS foundation trust to pay remuneration and allowances to any person includes power to make arrangements for providing, or securing the provision of, pensions or gratuities (including those payable by way of compensation for loss of employment or loss or reduction of pay).
- (4) “The purposes of the NHS foundation trust” means the general or any specific purposes of the trust (including the purposes of any specific hospital at or from which services are provided by the trust).

#### **48 Information**

- (1) An authorisation—
  - (a) must require an NHS foundation trust to disclose such information to the regulator as the Secretary of State specifies,
  - (b) may require an NHS foundation trust to disclose other information to the regulator.
- (2) The regulator may require any other health service body to disclose any information which the regulator requires for the purposes of its functions.

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#### **49 Entry and inspection of premises**

An authorisation may require an NHS foundation trust to allow the regulator to enter and inspect premises owned or controlled by the trust.

#### **50 Fees**

An authorisation may require an NHS foundation trust to pay a reasonable annual fee to the regulator.

#### **51 Trust funds and trustees**

- (1) The Secretary of State may by order provide for the appointment of trustees for an NHS foundation trust to hold property on trust—
  - (a) for the purposes of the NHS foundation trust, or
  - (b) for any purposes relating to the health service.
- (2) The order may—
  - (a) make provision as to the persons by whom trustees must be appointed and generally as to the method of their appointment,
  - (b) make any appointment subject to such conditions as may be specified in the order (including conditions requiring the consent of the Secretary of State),
  - (c) make provision as to the number of trustees to be appointed, including provision under which that number may from time to time be determined by the Secretary of State after consultation with such persons as he considers appropriate,
  - (d) make provision with respect to the term of office of any trustee and his removal from office.
- (3) Where trustees have been appointed for an NHS foundation trust under this section, the Secretary of State may by order provide for the transfer of any trust property from the NHS foundation trust to the trustees.
- (4) Where an NHS trust for which trustees have been appointed under paragraph 10 of Schedule 4 is given an authorisation, the order appointing the trustees has effect as an order under this section.
- (5) “The purposes of the NHS foundation trust” means the general or any specific purposes of the trust (including the purposes of any specific hospital at or from which services are provided by the trust).

#### *Failure*

#### **52 Failing NHS foundation trusts**

- (1) If the regulator is satisfied—
  - (a) that an NHS foundation trust is contravening, or failing to comply with, any term of its authorisation or any requirement imposed on it under any enactment and that the contravention or failure is significant, or
  - (b) that an NHS foundation trust has contravened, or failed to comply with, any such term or requirement and is likely to do so again and that the contravention or failure was significant,

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the regulator may by a notice to the trust exercise one or more of the powers in subsections (3) and (4).

- (2) The regulator may also by a notice to the trust exercise one or more of those powers if the regulator is satisfied that the trust has contravened or failed to comply with a previous notice.
- (3) The regulator may require the trust, the directors or the board of governors to do, or not to do, specified things or things of a specified description within a specified period.
- (4) The regulator may remove any or all of the directors or members of the board of governors and appoint interim directors or members of the board.
- (5) The regulator's power to remove a director, or member of the board of governors, of the trust includes power to suspend him from office, or to disqualify him from holding office, as a director or member of the board of governors of the trust for a specified period.

#### [<sup>F9</sup>52A Application of sections 52B to 52E

- (1) Sections 52B to 52E apply to—
  - (a) an NHS foundation trust authorised under section 35 on an application under section 33;
  - (b) an NHS foundation trust established under section 56 to which subsection (2) applies.
- (2) This subsection applies to an NHS foundation trust if—
  - (a) at least one of the trusts on whose application the NHS foundation trust was established was an NHS foundation trust within subsection (1)(a), or was an NHS trust all or most of whose hospitals, establishments and facilities were in England, or
  - (b) the NHS foundation trust is the result of a succession of mergers under section 56, any of which involved an NHS foundation trust within subsection (1)(a) or an NHS trust all or most of whose hospitals, establishments and facilities were in England.

#### Textual Amendments

**F9** Ss. 52A-52E inserted (19.1.2010 for specified purposes) by [Health Act 2009 \(c. 21\)](#), ss. 15, 40(1); S.I. 2010/30, art. 2(c)

#### 52B De-authorisation: regulator's notice

- (1) The regulator may give the Secretary of State a notice under this section if it is satisfied that—
  - (a) an NHS foundation trust to which this section applies is contravening or failing to comply with, or has contravened or failed to comply with, any term of its authorisation or any requirement imposed on it under any enactment, and
  - (b) the seriousness of the contravention or failure, or, if there has been more than one, of any of them taken together, is such that it would justify the Secretary of State making an order under section 52D.

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- (2) The notice must be in writing.
- (3) With the notice the regulator must give the Secretary of State a report stating the reasons why it is satisfied as mentioned in subsection (1).
- (4) Before giving a notice under this section, the regulator must consult first the Secretary of State (unless the notice follows a request by the Secretary of State under section 52E) and then—
  - (a) the trust,
  - (b) any Strategic Health Authority in whose area the trust has hospitals, establishments or facilities, and
  - (c) any other person to which the trust provides goods or services under this Act and which the regulator considers it appropriate to consult.

#### Textual Amendments

**F9** Ss. 52A-52E inserted (19.1.2010 for specified purposes) by [Health Act 2009 \(c. 21\)](#), **ss. 15, 40(1)**; [S.I. 2010/30](#), **art. 2(c)**

### 52C Grounds for de-authorisation notice

- (1) In determining under section 52B(1)(b) whether the making of an order would be justified, and in determining whether to give a notice under that section, the regulator must consider these matters (among others)—
  - (a) the health and safety of patients;
  - (b) the quality of the provision by the trust of goods and services;
  - (c) the financial position of the trust;
  - (d) the way it is being run.
- (2) The regulator must publish guidance as to the matters (including those mentioned in subsection (1)) that it proposes to consider in making those determinations.
- (3) Before publishing any guidance under this section, including any revised guidance, the regulator must consult—
  - (a) the Secretary of State,
  - (b) each NHS foundation trust to which this section applies,
  - (c) each NHS trust intending to make an application to become an NHS foundation trust, and
  - (d) such other persons as the regulator considers appropriate.

#### Textual Amendments

**F9** Ss. 52A-52E inserted (19.1.2010 for specified purposes) by [Health Act 2009 \(c. 21\)](#), **ss. 15, 40(1)**; [S.I. 2010/30](#), **art. 2(c)**

### 52D De-authorisation

- (1) If the regulator gives notice under section 52B in relation to a trust, the Secretary of State must make an order for it to cease to be an NHS foundation trust.

*Status: Point in time view as at 27/03/2012.*

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- (2) An order made under subsection (1) must specify the date when it is to take effect, which must be within the period of 5 working days beginning with the day on which it is made.
- (3) On an order under subsection (1) taking effect in relation to a body, it ceases to be an NHS foundation trust and a public benefit corporation and becomes a National Health Service trust.
- (4) The order must specify, in relation to the trust, the matters mentioned in paragraph 5(1)(a) to (c) of Schedule 4 and, where the trust has a significant teaching commitment, the matters mentioned in paragraph 5(1)(d).
- (5) The order may provide for any provision under subsection (4) specifying the number of executive directors and non-executive directors to take effect at the end of a period specified in the order.
- (6) Schedule 8A makes further provision about trusts in respect of which an order is made under subsection (1).
- (7) If it appears to the Secretary of State to be necessary in order to comply with provision made under subsection (4), or made by regulations under paragraph 4 of Schedule 4, the Secretary of State may by order—
  - (a) terminate the office of any executive or non-executive director of the trust;
  - (b) appoint a person to be an executive or non-executive director of the trust.
- (8) Within seven days after the day on which the Secretary of State makes an order under subsection (1) the regulator must publish its report under section 52B(3).
- (9) In this section “working day” means any day which is not Saturday, Sunday, Christmas Day, Good Friday or a day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971.

#### Textual Amendments

**F9** Ss. 52A-52E inserted (19.1.2010 for specified purposes) by [Health Act 2009 \(c. 21\)](#), **ss. 15, 40(1)**; [S.I. 2010/30](#), **art. 2(c)**

#### 52E Secretary of State's request

- (1) If it appears to the Secretary of State that there are grounds for the regulator to be satisfied as mentioned in section 52B(1), the Secretary of State may request the regulator in writing to consider exercising its power to give a notice under that section.
- (2) A request under this section must—
  - (a) specify the NHS foundation trust to which it relates, and
  - (b) state the grounds relied on by the Secretary of State.
- (3) The Secretary of State must lay before Parliament any request under this section.
- (4) If within the required period the regulator does not give a notice under section 52B in response to a request under this section, it must, within that period, publish its reasons for not doing so with a statement as to how it has complied with section 52C(1).
- (5) The required period is—

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- (a) 14 days beginning with the day after the regulator receives the request, or
  - (b) any longer period specified in the request.
- (6) The Secretary of State may by order extend or further extend the required period.]

#### Textual Amendments

**F9** Ss. 52A-52E inserted (19.1.2010 for specified purposes) by [Health Act 2009 \(c. 21\)](#), **ss. 15, 40(1)**; S.I. 2010/30, art. 2(c)

### 53 Voluntary arrangements

- (1) If the regulator is satisfied that it is necessary or expedient to do so, it may by a notice to an NHS foundation trust [<sup>F10</sup>to which this section applies] require the directors—
  - (a) to take steps to obtain a moratorium, or
  - (b) to make a proposal for a voluntary arrangement.
- (2) An order may provide for Part 1 of the Insolvency Act 1986 (c. 45) (company voluntary arrangements), including any related provision of that Act, to apply with modifications in relation to NHS foundation trusts [<sup>F11</sup>to which this section applies] .
- (3) References in this Chapter to a moratorium are to a moratorium under section 1A of that Act as modified by the order.
- (4) References in this Chapter to a voluntary arrangement are to a voluntary arrangement under Part 1 of that Act as modified by the order.

[<sup>F12</sup>(4A) This section applies to an NHS foundation trust to which sections 52B to 52E and Chapter 5A do not apply.]

#### Textual Amendments

**F10** Words in s. 53(1) inserted (15.2.2010) by [Health Act 2009 \(c. 21\)](#), **ss. 18(3), 40(1)**; S.I. 2010/30, art. 3(b)

**F11** Words in s. 53(2) inserted (15.2.2010) by [Health Act 2009 \(c. 21\)](#), **ss. 18(4), 40(1)**; S.I. 2010/30, art. 3(b)

**F12** S. 53(4A) inserted (15.2.2010 for specified purposes) by [Health Act 2009 \(c. 21\)](#), **ss. 18(5), 40(1)**; S.I. 2010/30, art. 3(b)

### 54 Dissolution etc

- (1) The powers conferred by this section are exercisable where—
  - (a) an NHS foundation trust [<sup>F13</sup>to which section 53 applies] contravenes or fails to comply with a notice under section 52 or 53 or the trust's compliance with a notice under section 53 does not result in the implementation of a voluntary arrangement, and
  - (b) the regulator considers that further exercise of any of the powers conferred by those sections would not be likely to secure the provision of the goods and services which the authorisation requires the trust to provide.
- (2) Before the powers conferred by this section are exercised, the regulator must consult specified persons about specified matters.

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- (3) “Specified” means specified in an order.
- (4) An order may transfer, or provide for the transfer of, any property or liabilities of the trust to—
  - (a) another NHS foundation trust,
  - (b) a Primary Care Trust,
  - (c) an NHS trust,
  - (d) the Secretary of State.
- (5) The liabilities which may be transferred by virtue of subsection (4) to any of the bodies mentioned in paragraphs (a) to (c) of that subsection include criminal liabilities.
- (6) Schedule 9 makes provision for the transfer of employees.
- (7) An order may provide for the dissolution of the trust.
- (8) An order may apply any provision of Part 4 of the Insolvency Act 1986 (c. 45) (winding up of companies), including any related provision of that Act, with modifications.
- (9) Where the regulator refuses to give an authorisation to a public benefit corporation—
  - (a) the powers conferred by this section are also exercisable, and
  - (b) references in this section and Schedule 9 to an NHS foundation trust are references to the corporation.

#### Textual Amendments

**F13** Words in s. 54(1)(a) inserted (15.2.2010) by [Health Act 2009 \(c. 21\)](#), **ss. 18(6), 40(1)**; S.I. 2010/30, art. 3(b)

## 55 Sections 53 and 54: supplementary

- (1) In sections 53 and 54, an order means an order made by the Secretary of State.
- (2) The modifications of the Insolvency Act 1986 that may be made by an order include—
  - (a) provision for securing that the goods and services which the trust is required by the authorisation to provide continue to be provided (whether by the trust or another),
  - (b) provision for securing the protection of property needed for the purposes of those goods and services.
- (3) The power conferred by section 54(3) must be exercised with a view to securing the provision of the goods and services which the authorisation requires the trust to provide.
- (4) That power must also be exercised (together, if required, with the power conferred by section 40(2)) with a view to securing that any transfer of property in pursuance of the exercise of the power does not result in a net loss of value to the trust; and the question whether a transfer would result in a net loss of value must be determined in accordance with regulations.
- (5) The Insolvency Act 1986 may not be modified under section 54(8) so as to alter the priority of debts or the ranking of debts between themselves.



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## Mergers

### 56 Mergers

- (1) An application may be made jointly by—
  - (a) an NHS foundation trust, and
  - (b) another NHS foundation trust or an NHS trust,to the regulator for authorisation of the dissolution of the trusts and the transfer of some or all of their property and liabilities to a new NHS foundation trust established under this section.
- (2) The application must—
  - (a) be supported by the Secretary of State if one of the parties to it is an NHS trust,
  - (b) specify the property and liabilities proposed to be transferred to the new NHS foundation trust,
  - (c) describe the goods and services which it is proposed should be provided by the new trust, and
  - (d) be accompanied by a copy of the proposed constitution of the new trust,and must give any further information which the regulator requires the applicants to give.
- (3) The applicants may modify the application with the agreement of the regulator at any time before authorisation is given under this section.
- (4) The regulator may—
  - (a) issue a certificate incorporating the directors of the applicants as a public benefit corporation, and
  - (b) give an authorisation under this section to the corporation to become an NHS foundation trust,if the regulator is satisfied as to the following matters.
- (5) The matters are that—
  - (a) the constitution of the new trust will be in accordance with Schedule 7 and will otherwise be appropriate,
  - (b) the applicants have taken steps to secure that (taken as a whole) the actual membership of any public constituency, and (if there is one) of the patients' constituency, will be representative of those eligible for such membership,
  - (c) the new trust will be able to provide the goods and services which the authorisation will require it to provide, and
  - (d) any other requirements which the regulator considers appropriate are met.
- (6) In deciding whether it is satisfied as to the matters referred to in subsection (5)(c), the regulator must consider (among other things)—
  - (a) any report or recommendation in respect of either of the applicants made by <sup>[F14]</sup>the Care Quality Commission ,
  - (b) the financial position of the applicants.
- (7) The applicants must consult about the application in accordance with regulations.
- (8) In the course of the consultation the applicants must seek the views of—
  - <sup>F15</sup>(a) .....
  - (b) the staff employed by the applicants,

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- (c) individuals who live in any area specified in the proposed constitution as the area for a public constituency,
  - (d) any local authority that would be authorised by the proposed constitution to appoint a member of the board of governors,
  - (e) if the proposed constitution provides for a patients' constituency, individuals who would be able to apply to become members of that constituency,
  - (f) any prescribed persons.
- (9) The regulator may not give an authorisation under this section unless it is satisfied that the applicants have complied with the regulations.
- (10) The certificate is conclusive evidence of incorporation; and the authorisation is conclusive evidence that the corporation is an NHS foundation trust.
- (11) On an authorisation being given under this section, the proposed constitution of the NHS foundation trust has effect, but the directors of the applicants may exercise the functions of the trust on its behalf until a board of directors is appointed in accordance with the constitution.

#### Textual Amendments

- F14** Words in s. 56(6)(a) substituted (1.4.2009) by [Health and Social Care Act 2008 \(c. 14\), s. 170\(3\)\(4\), Sch. 5 para. 84](#); S.I. 2009/462, art. 2(1), Sch. 1 para. 35(bb)
- F15** S. 56(8)(a) repealed (1.4.2008) by [Local Government and Public Involvement in Health Act 2007 \(c. 28\), s. 245\(5\), Sch. 18 Pt. 18](#); S.I. 2008/461, art. 2(3), Sch.

#### 57 Section 56: supplementary

- (1) Where an authorisation is given under section 56, the regulator must specify the property and liabilities to be transferred to the new NHS foundation trust.
- (2) Where such an authorisation is given, the Secretary of State must make an order—
- (a) dissolving the trusts in question, and
  - (b) transferring, or providing for the transfer of, the property and liabilities specified by the regulator to the new NHS foundation trust.
- (3) The order may—
- (a) transfer, or provide for the transfer of, any of the remaining property or liabilities to the persons mentioned in section 54(3),
  - (b) include provisions corresponding to those of Schedule 9.
- (4) In section 56(1) and (2), and subsections (1) and (2) of this section, “liabilities” includes criminal liabilities; and an order under subsection (3) of this section may transfer any remaining criminal liabilities to any of the bodies mentioned in section 54(4)(a) to (c).
- (5) Where one of the parties to an application under section 56 is an NHS trust, the powers conferred on the Secretary of State by Part 3 of Schedule 4 are not exercisable in relation to the trust.
- (6) Section 35(4) applies to an authorisation under section 56 as it does in relation to an authorisation under that section.

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### *Miscellaneous*

#### **58 Taxation**

Section 61(3) of the National Health Service and Community Care Act 1990 (c. 19) (health service bodies: stamp duty) applies to an NHS foundation trust as it applies to an NHS trust.

#### **59 Conduct of elections**

- (1) Regulations may make provision as to the conduct of elections for membership of the board of governors of an NHS foundation trust.
- (2) The regulations may in particular provide for—
  - (a) nomination of candidates and obligations to declare their interests,
  - (b) systems and methods of voting, and the allocation of places on the board of governors, at contested elections,
  - (c) filling of vacancies,
  - (d) supervision of elections,
  - (e) elections expenses and publicity,
  - (f) questioning of elections and the consequences of irregularities.
- (3) Regulations under this section may create offences punishable on summary conviction with a maximum fine not exceeding level 4 on the standard scale.
- (4) An NHS foundation trust must secure that its constitution is in accordance with regulations under this section.
- (5) Pending the coming into force of regulations under this section, elections for membership of the board of governors of an NHS foundation trust, if contested, must be by secret ballot.

#### **60 Voting and standing for election**

- (1) A person may not vote at an election for the board of governors of an NHS foundation trust unless, within the specified period, he has made a declaration in the specified form of the particulars of his qualification to vote as a member of the constituency, or class within a constituency, for which the election is being held.
- (2) A person may not stand for election to the board unless—
  - (a) he has within the specified period made a declaration in the specified form of the particulars of his qualification to vote as a member of the constituency, or class within a constituency, for which the election is being held, and
  - (b) he is not prevented from being a member of the board by paragraph 8 of Schedule 7.
- (3) A person elected to the board may not vote at a meeting of the board unless—
  - (a) he has within the specified period made a declaration in the specified form of the particulars of his qualification to vote as a member of the trust, and
  - (b) he is not prevented from being a member of the board by paragraph 8 of Schedule 7.
- (4) This section does not apply to an election held for the staff constituency.

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- (5) “Specified” means specified in the trust's constitution.
- (6) A person is guilty of an offence if he—
  - (a) makes a declaration under this section which he knows to be false in a material particular, or
  - (b) recklessly makes such a declaration which is false in a material particular.
- (7) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

## **61 Representative membership**

An authorisation may require an NHS foundation trust to take steps to secure that (taken as a whole) the actual membership of any public constituency and (if there is one) of the patients' constituency is representative of those eligible for such membership.

## **62 Audit**

Schedule 10 makes provision in relation to the audit of accounts of NHS foundation trusts.

## **63 General duty of NHS foundation trusts**

An NHS foundation trust must exercise its functions effectively, efficiently and economically.

### *Supplementary*

## **64 Orders and regulations under this Chapter**

- (1) Any power under this Chapter to make an order or regulations is exercisable by statutory instrument.
- (2) Subject to subsections (3) and (4), a statutory instrument made by virtue of this Chapter is subject to annulment in pursuance of a resolution of either House of Parliament.
- (3) A statutory instrument containing—
  - (a) the first regulations under section 55(4) or 59,
  - [<sup>F16</sup>(aa) regulations under paragraph 30(1) of Schedule 7,] or
  - (b) an order or regulations under this Chapter making, by virtue of subsection (5) (b), provision which amends or repeals any part of the text of an Act,
 may not be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament.
- (4) Subsection (2) does not apply to a statutory instrument containing an order under—
  - (a) section 51,
  - (b) section 54(4), or
  - (c) section 57.
- (5) Any order or regulations under this Chapter—

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- (a) may make different provision for different purposes, and
  - (b) may make incidental, supplementary, consequential, transitory or transitional or saving provision.
- (6) Any power under this Chapter to make an order or regulations (as well as being exercisable in relation to all cases to which it extends) may be exercised in relation to all those cases subject to exceptions or in relation to any particular case or class of case.

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**Textual Amendments**

**F16** S. 64(3)(aa) inserted (27.3.2012 for specified purposes, 1.10.2012 in so far as not already in force) by [Health and Social Care Act 2012 \(c. 7\)](#), [ss. 158\(2\)](#), [306\(1\)\(d\)\(4\)](#); [S.I. 2012/1831](#), [art. 2\(2\)](#)

## 65 Interpretation of this Chapter

- (1) In this Chapter—
- “authorisation” means an authorisation under section 35 or 56,
  - “health service body” means a Strategic Health Authority, a Primary Care Trust, an NHS trust, a Special Health Authority or an NHS foundation trust.
- (2) Any references in this Chapter to goods and services include, in particular, facilities, education and training.

**Status:**

Point in time view as at 27/03/2012.

**Changes to legislation:**

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