Monitor’s provider licence will be our key tool with which we will regulate providers of NHS services.

This document is our statutory consultation on the first version of the new NHS provider licence.
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Foreword

Monitor’s provider licence will be our new, key tool with which we will regulate providers of NHS services. This document is our statutory consultation on the first version of this licence.

In addition to translating the well-established core of Monitor’s current oversight of NHS foundation trust governance into Monitor’s new licence-based system of regulation, the licence covers Monitor’s new functions. It will allow Monitor to collect the information needed to set prices for NHS-funded services, which is one of the most important levers that we will have to drive benefits for patients in our new role as the sector regulator for health care. The licence also puts in place important parts of a framework which will ensure that, if providers experience financial difficulties, services for patients are protected. The licence conditions will help Monitor safeguard patient choice, tackle anti-competitive behaviour where the interests of patients would be harmed, and enable integrated care.

I have told the Department of Health that Monitor expects to be ready to issue licences to NHS foundation trusts in April 2013. Importantly though, this date is subject to the results of this consultation exercise. If we need more time to talk to you, or we need to rework some of the proposals, based on your views, then we will recommend revising the target date for the first licences to be issued.

Our formal proposals in this document have been influenced and shaped, and have very much benefited from, the responses to our informal engagement exercise earlier this year. We are very grateful for the productive discussions with providers, commissioners and partners so far, and we look forward to continuing this throughout the consultation.

Thank you, in advance, for taking time to read and respond to this consultation. Your continued input is vital and we look forward to hearing from you.

Dr David Bennett

Chairman and interim Chief Executive
Executive summary

The Health and Social Care Act 2012 (the Act) makes changes to the way NHS service providers will be regulated, and gives Monitor new duties and powers. These changes include the introduction of a Monitor licence for providers of NHS services.

This is the statutory consultation that Monitor needs to hold before the first version of the licence is introduced. In early 2012 we engaged with stakeholders on the licence through issuing documents, and holding discussions and workshops. So the revised proposals set out in this document already reflect a great deal of input and feedback from our stakeholders. Throughout September and October 2012 we will be holding more events and hosting discussions to make sure that we hear as many views as possible before we finalise the licence.

Monitor, with its new functions, sits within an overall sector regulatory system made up of the Care Quality Commission, NHS Commissioning Board and others. And Monitor’s licensing system consists of more than the licence. Secondary legislation will add more detail to the Act, and create the framework for Monitor’s provider licence by setting out, for example, which providers need a licence and the process for challenging any changes that Monitor makes to the licence. The Department of Health is due to consult soon on the framework that surrounds the licence.

The Department of Health has confirmed that its intention is for NHS foundation trusts to be licensed one year before other providers. This is to allow time for Monitor and the Care Quality Commission, as required by the Act, to implement a joint licensing and registration system.

NHS foundation trusts do not need to apply for a licence. We will issue licences to NHS foundation trusts when the relevant part of the Act comes into force. We expect this to be April 2013, subject to the results of this consultation, with other providers needing a licence from April 2014.

The proposed licence contains seven sections. The first section, General conditions, sets out standard requirements and rules for all licence holders. Sections 2 to 5 of the licence are about Monitor’s new functions of setting prices; enabling services to be provided in an integrated way; safeguarding choice and competition; and supporting commissioners to maintain service continuity. Section 6 is about translating the well established core of Monitor’s current oversight of foundation trust governance into the new provider licence. The final section, 7, contains definitions and notes.

The proposed licence conditions

The general licence conditions

General licence conditions set out the standard behaviours which Monitor expects from all licensees. We propose that these conditions should apply to all licence holders.

There are ten proposed general conditions covering areas such as the provision and publication of information, payment of fees, tests for fit and proper persons, and a requirement for providers to be registered with the Care Quality Commission.
We ask for input and comment on the fit and proper persons test which appears in the general conditions but is also a requirement providers must meet before they can obtain a licence. This requires providers to check that directors, governors (or equivalents) are fit and proper. We are consulting on various points, including whether we should include in the condition a requirement for directors, governors (or equivalents) to adhere to a set of standards around personal behaviours, technical competence, and business practices.

We also consult on whether we should include the possibility for Monitor, in very exceptional circumstances and at our discretion, to waive the requirements of the fit and proper persons test.

**Pricing licence conditions**

In future, Monitor will be responsible, in partnership with the NHS Commissioning Board, for setting prices for NHS services. There are five proposed licence conditions to help us fulfil this duty. We propose that these conditions apply to all licensees that are covered by the National Tariff document.

The pricing licence conditions cover the recording and provision of information, assurance about data submissions, compliance with the National Tariff, and constructive engagement with commissioners around local tariff modifications.

The proposed pricing licence conditions remain broadly the same as those we issued in our engagement documents earlier in the year.

**Choice and Competition licence conditions**

Our proposed patient choice and competition licence conditions will allow us to protect and promote patients’ interests by supporting patient choice and, where it is in the interests of patients, preventing anti-competitive behaviour.

There are three choice and competition licence conditions and we propose that they apply to all licence holders, apart from condition 3 which is about notifying the Office of Fair Trading (OFT) of mergers. We propose this condition only applies to NHS foundation trusts.

We are consulting on whether we should include in the choice condition an additional clause that, in certain circumstances, would require licensees to ensure that patients are offered impartial advice about the choices available. We also ask whether condition 3, the requirement to notify the OFT of mergers, is necessary at all.

**Integrated care licence condition**

We propose that the integrated care licence condition should apply to all licence holders.

We have changed our proposed condition on integrated care since we engaged with stakeholders earlier this year. This is because of the findings of a research report that we published in June 2012. We set out three options and propose our preferred option for the condition:

- Option A: A positive obligation - the licensee shall take such steps as are reasonably regarded as necessary for the purpose of enabling integrated care;
• Option B: A broadly defined prohibition - the licensee shall not do anything that would reasonably be regarded as detrimental to enabling integrated care; or
• Option C: A prohibition on actions that might block - the licensee shall not unreasonably block the integration of care.

Monitor’s preferred option is B, a broadly defined prohibition – we think that this leaves appropriate room for providers and commissioners to take the lead in developing integrated care.

**Continuity of Services licence conditions**

Our proposed Continuity of Services licence conditions will enable us to protect and promote patients’ interests by ensuring that services continue to operate where a provider becomes financially distressed or insolvent. We propose that all seven Continuity of Services licence conditions will apply to all licence holders that provide Commissioner Requested Services.

The Continuity of Services licence conditions cover the designation of Commissioner Requested Services, the continuity of that designation, restriction on the disposal of assets, Monitor’s risk rating, undertakings from an ultimate controller, contribution to a risk pool levy, cooperation in the event of financial stress, and reporting on the availability of resources.

There have been some significant changes to the conditions following our engagement with stakeholders earlier this year. For example, we now propose that Monitor will calculate a risk rating rather than providers being expected to obtain an external credit rating. Also, we propose to remove some restrictions on indebtedness, lending, and cash lock-ups, from the conditions.

We are consulting on whether the automatic designation of NHS foundation trusts’ mandatory services as Commissioner Requested Services should be time limited.

Where the Continuity of Services conditions apply, Monitor has a duty to make an assessment of the risks to the continued provision of Commissioner Requested Services. We intend to meet this duty by setting out a Risk Assessment Framework. We will be consulting on this framework later in 2012, but so that stakeholders can anticipate how the Continuity of Services conditions are likely to operate in practice, we have set out a summary of our current thinking at Annexe One to this document. The Risk Assessment Framework will also be used in Monitor’s oversight role for NHS foundation trusts, ensuring we have a single overall framework for our monitoring activity.

Relevant to the Continuity of Services licence conditions is a guidance document that we will soon publish to help commissioners select which services they propose should be designated as Commissioner Requested Services.

**Foundation Trust licence conditions**

There have been changes to the proposed licence conditions since we engaged with stakeholders earlier this year. In the final stages of the Health and Social Care Bill 2011 (the Bill), the means by which Monitor is to continue to oversee NHS foundation trusts changed. The Act allows Monitor to set licence conditions specific to NHS foundation trusts so long as those conditions relate to governance.

We propose four licence conditions that will apply only to NHS foundation trusts. These conditions cover the provision of information relevant to Monitor’s duty to maintain the register of NHS
foundation trusts and the possibility of associated fees, an obligation to provide information requested by an advisory panel, and a condition that enables Monitor to continue its oversight of the governance of NHS foundation trusts.

Other documents and further guidance

There are other consultations that are due to start soon, which will complete the new health sector regulation system. We explain in this document how the various parts of the system interact with Monitor’s provider licence, and when stakeholders can expect to receive more information. The Department of Health has set out a useful overview here, with the timing of its various consultations on secondary legislation.

The Act says that we must carry out an impact assessment when we do something which may have a significant impact on those who provide or use NHS services, or on the general public. We have been working on an impact assessment of the proposed draft licence conditions at the same time as the licence proposals were being prepared, and we will publish the impact assessment soon.

Thank you

Many people have already helped us to develop the proposed licence. Providers and commissioners have spent time with us discussing, and constructively challenging, the conditions. Trade bodies and industry groups have held roundtables and events. The Care Quality Commission, the NHS Commissioning Board, the Co-operation and Competition Panel, and the Department of Health have all been generous with their time. We are very grateful for this assistance with our work.

Thank you for taking the time to read and respond to this consultation by 23 October 2012.
1. How to respond to this consultation

We welcome all responses to this consultation. We have asked a number of questions, which can be found in the relevant sections of the document and are also listed at the end of Chapter 9. We very much welcome any comments that you wish to make on our proposals and, when you are considering your comments, we should be grateful if you would consider responding to our specific questions.

Please submit your responses to the questions and any other comments that you have by **5pm on Tuesday 23 October 2012**. There are a number of ways to send us your comments.

**Online**

You can find a response form on our website at [www.monitor-nhsft.gov.uk/consult](http://www.monitor-nhsft.gov.uk/consult). This is our preferred way of receiving your comments. However you are also welcome to send your response by email or post.

**By email**

You can email your response to licensing@monitor-nhsft.gov.uk

**By post**

Send your response to: Licence consultation, Monitor, 4 Matthew Parker Street, London, SW1H 9NP.

**Confidentiality**

If you would like your name, or the name of your organisation, to be kept confidential and excluded from the published summary of responses or other published documents, you can request this on the response form. If you send your response by email or post, please don’t forget to tell us if you wish your name, or the name of your organisation, to be withheld from any published documents.

If you would like any part of your response - instead of or as well as your identity - to be kept confidential, please let us know and make it obvious by marking in your response which parts we should keep confidential - an automatic computer-generated confidentiality statement will not count for this purpose. As we are a public body subject, for example, to Freedom of Information legislation we cannot guarantee that we will not be obliged to release your response even if you say it is confidential.

**What we will do next**

We hope and expect that we will receive a lot of responses to this consultation, so we do not intend to write back to everyone who contacts us. However we will read and consider all responses and, when we publish the final licence, explain how your comments and views influenced the final licence.

You can sign up to receive emails when we publish other licensing engagement and consultation publications [here](http://www.monitor-nhsft.gov.uk/) on our website.
2. Introduction to the provider licence

The Act sets out that Monitor’s main duty will be to protect and promote the interests of people who use health care services. Monitor must do this by promoting the provision of health care services which is effective, efficient and economic, and which maintains or improves the quality of services. The Act gives Monitor new duties and powers. Monitor’s current role overseeing the governance of NHS foundation trusts will continue alongside new functions which include:

- in partnership with the NHS Commissioning Board, setting prices for NHS-funded care;
- enabling integrated care;
- preventing anti-competitive behaviour which is against the interests of patients; and
- supporting commissioners to maintain service continuity.

The Act requires us to introduce a regulatory licence for providers of NHS services and this licence will form a key part of the new regulatory system. It will set out various obligations on providers of NHS services including those relating to the four functions listed above and, in addition, some specific obligations on NHS foundation trusts. There are other parts of the regulatory system in addition to the provider licence - some of these will be defined by the Department of Health in secondary legislation, and some will be put in place by partners of Monitor such as the NHS Commissioning Board.

2.1 Who needs a Monitor provider licence and when do they need it?

The Act requires any person who provides an NHS health care service to hold a licence unless they are exempt under regulations made by the Department of Health (the exemption regulations). The section of the Act that contains this requirement will be brought into force by a commencement order. A commencement order is a form of Statutory Instrument which is designed to bring into force the whole or part of an Act of Parliament. Different parts of an Act may be brought into force at different times.

Therefore, the combination of the exemption regulations, and the commencement of the relevant section of the Act, will determine the type of providers that need to apply for a licence and the date at which they need that licence. NHS foundation trusts will not need to apply for a licence. This is because the Act says that when the relevant part of the Act comes into force, Monitor must automatically issue licences to NHS foundation trusts.

The Department of Health’s consultation on the exemption regulations is expected to be available during August 2012.

The Department of Health has confirmed that its intention is that NHS foundation trusts should be licensed one year before other providers – this is to allow time for Monitor and the Care Quality Commission to implement a joint licensing and registration system as described in section 3.

We have told the Department of Health that we expect to be ready to issue licences to NHS foundation trusts in April 2013, but this date is subject in particular to the results of this consultation exercise on the provider licence – if responses to this consultation means that we need more time to talk to stakeholders, or need to rework some of the proposals, then we will revise the target date for
the licensing of NHS foundation trusts. The date may also be affected by other matters, such as the recommendations from the report of the Mid Staffordshire NHS Foundation Trust Public Inquiry.

### 2.2 Overview of the provider licence

The proposed licence contains seven sections. Some sections will apply to all licence holders, and some sections will only apply to certain types of licence holders, for example, NHS foundation trusts. The first section, general conditions, sets out standard requirements and rules for all licence holders. Sections 2 to 5 of the licence are about Monitor’s new functions described above, and section 6 is about translating the well established core of Monitor’s current oversight of NHS foundation trust governance into Monitor’s new licence-based system of regulation. The final section, 7, contains definitions and notes.

**Figure 2.1 The sections of Monitor’s proposed provider licence**

1. **General conditions**
   - General conditions apply to all providers and impose obligations such as, for example, that directors must be “fit and proper” and providers must respond to information requests from Monitor.

2. **Licence conditions setting obligations about pricing**
   - The pricing licence conditions oblige providers, for example, to record information that Monitor needs to set prices, check that the data is accurate and, where required, charge commissioners in accordance with the National Tariff.

3. **Licence conditions setting obligations around choice and competition**
   - These conditions, where appropriate, oblige providers to help patients make the right choice of provider and, where there is a risk to the interests of patients, prohibit anti-competitive behaviour.

4. **Licence conditions to enable integrated care**
   - Licence conditions on integrated care enable the provision of integrated services by obliging providers to support these services where they improve the quality of care to patients.

5. **Licence conditions that support continuity of service (CoS)**
   - These conditions apply when a provider is delivering “commissioner requested services”. These conditions help Monitor assess whether there is a risk to services, and set out how services are protected if a provider gets into financial difficulties.

6. **Governance licence conditions for foundation trusts**
   - These licence conditions apply only to foundation trusts and translate the well established core of Monitor’s current oversight of foundation trusts into the new licensing regime by imposing obligations around appropriate standards of governance.

7. **Interpretation and definitions**
   - This section defines terms used in the licence such as, for example, what we mean by “related persons” and the section also contains some notes referring to legislation.
In this consultation, we explain our objectives for each part of the licence and any options or alternatives that we are considering for the licence conditions themselves. We also say whether we have changed our view about what should be in the licence in response to what stakeholders told us during our engagement on the provider licence earlier this year, subsequent changes in the Bill, or our own research. Our research reports expand on the background to some of the licence conditions now proposed, or give helpful context to them. For example:

- **Enablers and barriers to integrated care and implications for Monitor**;
- **Strategic options for costing**; and
- **A methodology for approving local modifications to the National Tariff**.

In drafting the licence conditions we have tried to use language that is as accessible as possible while retaining legal certainty. We expect the drafting of the conditions to change as we continue to make them as clear as possible, and your input on the wording we use is very welcome.

### 2.3 The Monitor provider licence – part of a regulatory system

Monitor, with its new functions, sits within an overall sector regulatory system made up of the functions of the Care Quality Commission (CQC), the NHS Commissioning Board (NHSCB), clinical commissioning groups (CCGs) and others. The Department of Health has set out a useful overview [here](#), with the timing of its various consultations on secondary legislation.

Monitor’s licensing system consists of more than the licence. Secondary legislation adds more detail to the Act, and creates the framework for the licence by setting out, for example, which providers need a licence and the process for challenging any changes we make to the licence. It is normal for regulators who issue a licence to set out in guidance how the licence will work in practice, and we intend to do this. Guidance on some of the licence conditions will contain more detail about how we expect to interpret or use a licence condition.

Guidance is designed to explain obligations and not to impose them – its purpose is to help licence holders understand the obligations that apply to them and how they can best comply, as well as explaining how Monitor will exercise its enforcement powers to monitor and enforce compliance with the licence. The proposed licence obliges licensees to *have regard* to Monitor’s guidance. We will generally consult before we finalise any formal guidance.

We will not issue all of the guidance associated with the licence right away. For example, we expect that, at some point in the future, guidance on the integrated care condition might be useful to explain how we think providers should act to make sure they do not hinder the development of integrated care. But this type of guidance is likely to be more useful later, as thinking develops, rather than now.

One area where we think it will be helpful to issue guidance soon is on our proposed Risk Assessment Framework, which is relevant to the Continuity of Services and NHS foundation trust conditions. We intend to consult on this guidance later in 2012, but we have already set out a high level summary of this guidance now, which can be found in Annexe One.
Another area where we are issuing early guidance is on how Commissioner Requested Services (CRS) and protected services - protected services are determined when a licensee fails and enters special administration - may be designated. This is relevant to the Continuity of Services licence conditions. The formal consultation on this guidance will be published soon.

In this document we explain, for each licence condition or set of licence conditions, why other consultations by either the Department of Health, or by Monitor, are relevant. We also outline when stakeholders might expect to receive more information or, if this information is already available where to find it. Figure 2.2 shows an overview of the consultations and information that are most relevant to Monitor’s provider licence.
Figure 2.2 Guide to the main sections of this consultation, and further guidance that will be issued later, information and regulations relevant to the provider licence

<table>
<thead>
<tr>
<th>General information on the licensing regime</th>
<th>Monitor guidance</th>
<th>Department of Health regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>General conditions</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Licence conditions setting obligations about pricing | • How Monitor will collect cost information  
• The process for local modifications | • Challenging a tariff set by Monitor |
| Licence conditions setting obligations around choice and competition | • The provision of information  
• The type of behaviour that might breach the choice and competition conditions or competition legislation  
• Guidance on how Monitor will enforce procurement regulations | • Rules for commissioners on procurement, choice and anti-competitive behaviour |
| Licence conditions to enable integrated care | • Reasonable behaviour to enable integrated care |                                  |
| Licence conditions that support continuity of service (Cos) | • Monitor’s Risk Assessment Framework (summary available as Annex 1)  
• Commissioner Requested Services and Protected Services (will shortly be published under a separate consultation)  
• Operation of the risk pool  
• Relevant assets (summary available as Annex 3) | • Health special administration regime  
• Challenging provider risk pool levies  
• Powers for Monitor to levy charges on commissioners for the risk pool |
| Governance licence conditions for foundation trusts | • Monitor’s Risk Assessment Framework (summary available as Annex 1) |                                  |

This diagram is simplified and covers only those aspects of the regulatory regime most relevant to Monitor’s provider licence.
2.4 Impact assessment of the licence

The Act places on Monitor a duty to review regulatory burdens, that is, the additional cost and workload placed on providers to meet our regulatory requirements, and a duty to carry out impact assessments. The purpose of these obligations is to ensure we do not impose burdens which are unnecessary, and make sure that we try to avoid maintaining burdens which have become unnecessary. The Act requires Monitor to start conducting reviews of regulatory burdens as soon as practicable, and to conduct them on an annual basis. It also requires Monitor to publish statements setting out what it has done, and proposes to do, as a result of these regulatory burden reviews.

The Act says that we must carry out an impact assessment when we do something which may have a significant impact on those who provide or use NHS services, or on the general public. A major change to our standard licence conditions is included as a circumstance which would require an impact assessment.

We have been working on an impact assessment of the proposed draft licence conditions at the same time as the licence proposals were being prepared, and our proposed licence conditions take into account the results of the impact assessment. We will publish the impact assessment soon here on our website. We need to publish it a short time after this consultation on the licence conditions so that we can make sure that it represents the very latest proposals set out in this document.

Our impact assessment of the licence is part of a series of impact assessments and regulatory burden reviews for the new sector regulation in health care – those that came before the licence conditions proposals and those that will come after.

Impact assessments before Monitor’s licence impact assessment

Last year, the Department of Health published an impact assessment of the Bill, which included a section on provider regulation. This estimated the costs and benefits associated with the changes to provider regulation proposed in the Bill, comparing them to a scenario in which such changes were not made.

Monitor’s impact assessment of its licence is being conducted after the Bill has become law. So we are comparing the costs and benefits of our proposals with a scenario in which the Act is in place. This means that we do not assess the impact of the changes put in place by the Act, but only the way in which Monitor has decided to implement the relevant parts of the Act. A good example is the licence condition requiring licensees to provide Monitor with information. The power to require information already exists in the Act, and this would remain the case regardless of whether Monitor includes a licence condition in its provider licence. The impact of replicating the obligation that exists in the Act within the licence is that we create a more straightforward enforcement route for Monitor’s information collection powers where this obligation to supply information is related to the licence or licence conditions. The key point is that the licence does not impose the obligation in the first place – this has already been done by the Act.

Impact assessments after Monitor’s licence impact assessment

There are several licence conditions which do not impose an immediate burden, but do give Monitor the power to ask licence holders to do things in the future. The licence condition
requiring licence holders to provide Monitor with information is again a good example of this type of condition. Monitor is likely to use its powers in the future to oblige providers to supply information. But at this point in time, it is not known what, or how much, data Monitor might request – so an impact assessment cannot be done now. For example, it may be the case that in the future Monitor asks providers to supply information about indicators of quality needed to monitor the incentives created around setting prices in a certain way (or Monitor might not need to do this, because another regulator already collects this data and may share it with Monitor). When we make these types of decisions, in the future, we will consider whether they need to be assessed either by carrying out a stand-alone impact assessment, or by including them in the annual review of regulatory burdens.

**Figure 2.3 Impact assessments and regulatory burden reviews**
3. **The provider licence system**

Once the first version of Monitor’s provider licence is finalised, NHS foundation trusts will be the first NHS providers to be licensed in 2013. We expect that other providers who will need to apply for a licence may do so in 2014.

This chapter explains how we will work with the Care Quality Commission (CQC) on a joint application process to issue licences and registrations in 2014, and we are now consulting on the criteria providers will need to meet before they can be issued with a licence.

Once any provider has a licence, it must comply with it, and we expect to enforce the relevant licence conditions. In this chapter we give an overview of our enforcement powers. This part of the document is for information only, so that stakeholders can understand the way the licensing system will work. We are not consulting on enforcement guidance now – we will issue formal enforcement guidance for consultation later in the year.

After the first version of the licence has been issued, the Act says that we must consult if we wish to change any part of the licence. If we do not secure agreement to the change, then Monitor cannot make that change without a reference to the Competition Commission (CC). The Department of Health will be consulting on how many organisations need to object to any proposed change to the licence for Monitor to be prevented from making it. Since these matters are for the Department of Health, this is included only for information and to complete the explanation about the licensing system. The Department of Health’s consultation will be published on its website [here](#).

### 3.1 Applying for a Monitor provider licence

The Act requires Monitor to set and publish criteria which must be met before it is able to grant a licence. If these criteria are met, Monitor must issue a licence.

Monitor proposes to set two criteria which must be satisfied before a licence is issued:

1. the provider must hold a CQC registration; and
2. providers must confirm that their governors and directors, or equivalent people, are fit and proper.

These requirements also appear in the licence as ongoing obligations in general condition 4, that is, a provider must continue to meet the licensing criteria in order to continue to hold a licence, not just in order to obtain it.

For the purpose of the licence application criteria, fit and proper persons are defined as those without recent criminal convictions or director disqualifications, and those not bankrupt (undischarged). As part of the licence application process we intend that applicants will be required to self-certify that their governors and directors, or those performing equivalent or similar functions (we use the term ‘equivalent people’), meet the fit and proper persons test. Monitor will not normally carry out any checks itself.

**Options and variations that we are considering**

In response to comments made when we engaged with stakeholders earlier in the year on the licence, we are considering including an exemption in the fit and proper persons test used in the
licensing criteria and in general condition 4. Stakeholders told us that they may wish to appoint past or current service users who may bring valuable experience, but fail the fit and proper persons test perhaps, for example, because of a criminal conviction. So the policy objective behind this proposal is to allow Monitor to decide to issue a licence or to allow a provider to continue to hold a licence where, in very exceptional circumstances and at Monitor’s discretion, organisations may have people appointed as governors or directors (or equivalent people) who do not meet the fit and proper persons test. We would expect to make such decisions only where we are convinced that there are clear benefits of doing so.

There are, however, some disadvantages to this proposal. Most of the requirements of the fit and proper persons test for NHS foundation trusts cannot be relaxed, as they are contained in legislation. To allow the obligation to be relaxed for other providers could be regarded as treating those providers more favourably and in a way that might not be seen as justified, although whether this would be material and justifiable could be considered on a case-by-case basis. In addition, it could be argued that the obligations are time limited, for example, the conviction of any offence is in the preceding five years and so does not represent an absolute bar on appointing current and past service users who may have been convicted of an offence.

**Chapter 3 Q1:** Do you think Monitor should include the option to retain the discretion to issue a licence or to allow a provider to continue to hold a licence where, in exceptional circumstances and at Monitor’s discretion, a director or governor (or equivalent person) fails the fit and proper persons test?

We are also considering whether the fit and proper persons test should include a requirement that governors and directors (or equivalent people) adhere to appropriate standards such as those proposed by the Council for Healthcare Regulatory Excellence (CHRE) for members of NHS boards. In early 2012, CHRE published a consultation document on standards that it proposed to apply to members of boards and governing bodies in NHS organisations including:

- chief executives;
- executive directors who sit on the board, such as medical, nursing, finance, and HR;
- chairs and other non-executive directors.

The proposals from CHRE can be found here. These proposed standards cover personal behaviours, technical competence, and business practices.

Our proposal to include reference to these standards could be implemented in different ways. For example, we could be very specific about the reference to a certain set of standards, such as those proposed by CHRE, or we could be broader and include generally recognised standards such as those published by The Institute of Healthcare Management here, or we could set out a version of these standards in guidance to the licence condition. We could apply the proposal only to NHS organisations, as set out by CHRE, or also apply it to any independent organisation seeking a Monitor licence required to provide NHS services. Although the CHRE proposals are aimed at organisations that have as their main business the provision of NHS services, it could be argued that these standards may reasonably be required of governors and directors (or equivalent people) of any organisation providing any NHS service.

The policy objectives of the proposal would be, firstly, to ensure that there is a commitment from governors and directors (or equivalent people) to the relevant standards, and secondly, to
prevent someone who has clearly already breached these standards from remaining as, or becoming, a governor or director (or equivalent person) of an organisation holding a Monitor licence. The potential disadvantage of the proposal is that it may impose an additional administrative burden, particularly on those licensees not already obliged to adhere to similar standards.

**Chapter 3 Q2: Do you think Monitor should include in the fit and proper person test a requirement that directors and governors (or equivalent people) adhere to relevant standards of personal behaviours, technical competence and business practices?**

If so, do you think such a requirement should apply to all licensees? What standards should Monitor use as a reference? Or should Monitor set out the relevant standards in guidance to the licence condition?

**Listening to our stakeholders**

In addition to consulting on the option above, the current drafting of the fit and proper persons test reflects a change we made in response to concerns that the original proposed wording applied also to ‘anyone with material influence’. Stakeholders told us this original definition may be too wide. The current proposed wording limits the test to directors and governors or those performing equivalent or similar functions.

**Chapter 3 Q3: Do you support the proposed changes to limit the fit and proper persons test to directors and governors or those performing equivalent or similar functions?**

**The licence application process**

The process of obtaining a licence will be straightforward. We do not anticipate that providers will need to submit a large volume of information and, as described above, there are only two points contained in the licensing criteria – the requirement to hold a CQC registration and to self-certify that relevant people are fit and proper.

The Act requires Monitor and the CQC to share the same process to issue licences and registrations. We have been working closely with the CQC and our intention is to implement a licensing system that is able to make use of data, where appropriate, already held by the CQC and gives new providers a single point of contact to obtain both a Monitor licence and CQC registration.

**3.2 How the licence will apply to different providers**

We propose, for reasons we explain alongside each licence condition, that not all sections of the licence are applicable for all providers of NHS-funded services that are required to hold our licence:

- **General conditions**: we propose that this section applies to all licence holders
- **Pricing conditions**: we propose that this section applies to all licence holders who provide services covered by the National Tariff
- **Choice and Competition conditions**: we propose that this section applies to all licence holders - apart from the requirement to notify the Office of Fair Trading (OFT) of mergers, which would only apply to NHS foundation trusts
- **Integrated Care condition**: we propose that this section applies to all licence holders
- **Continuity of Services conditions**: we propose this section applies to licence holders who supply Commissioner Requested Services
- **NHS foundation trust conditions**: we propose that this section only applies to NHS foundation trusts

### 3.3 Enforcing the licence

**Prioritising Monitor’s work**

In exercising our functions, including deciding to investigate whether a provider may be in breach of a licence condition, we must comply with our main duty to protect and promote the interests of people who use health care services. It may be that, in certain circumstances, some potential breaches of the licence conditions may have the possibility to have a bigger negative impact on people who use health care services than others – and so it may be appropriate for us to focus our resources where we can have the maximum positive impact. Or it may be that for some potential breaches, informal guidance is more effective, appropriate, and cost-effective than completing a formal investigation. In any event, like most regulators, our resources will be limited and we are very likely to need to prioritise the action we take. Other regulators have set out in advance how they take such prioritisation decisions, for example:

- the OFT prioritises its work based on an assessment of potential impact, strategic significance, the risks involved and the resources required. See: [www.oft.gov.uk/shared_oft/about_oft/of953.pdf](http://www.oft.gov.uk/shared_oft/about_oft/of953.pdf);
- Ofwat prioritises its work based on a risk based approach of assessing the costs and benefits, whether Ofwat is best placed to act, and has the right regulatory tool available. See: [www.ofwat.gov.uk/regulating/compliance/pap_pos1203regcomp.pdf](http://www.ofwat.gov.uk/regulating/compliance/pap_pos1203regcomp.pdf); and
- the Co-operation and Competition Panel already has in place prioritisation principles which are very similar to the OFT’s, based on impact, strategic significance and resources required. See: [www.cpanel.org.uk/content/CCP_Prioritisation_Criteria.pdf](http://www.cpanel.org.uk/content/CCP_Prioritisation_Criteria.pdf).

We think that this type of guidance helps a regulator focus its efforts and resources on the right things, helps stakeholders know what to expect, and provides transparency about the decisions made. We expect to develop our own prioritisation guidance and consult on it later in 2012. Around the same time, we expect to set out more about our procedures, including how we may investigate a potential breach of the licence, or other legislation, and how we will take our provisional and final decisions about whether a provider is actually in breach of its licence or other legislation.

**Monitor’s enforcement powers**

The Act sets out the enforcement powers which Monitor will have to ensure compliance with the licence. As described above, it may not always be the case that we decide to tackle a potential breach of the licence using Monitor’s formal powers, but where we do use Monitor’s formal powers and are satisfied that a provider is in breach of the requirement to hold a licence, or in breach of a licence condition, or in breach of a requirement to provide Monitor with documents and/or information, Monitor may impose ‘discretionary requirements’. These may oblige a provider to:

- pay a ‘variable monetary penalty’ determined by Monitor;
• take such steps, specified by Monitor, to ensure the breach does not continue or recur (a compliance requirement); or
• take such steps, specified by Monitor, to restore the position to what it would have been if the breach had not occurred (a restoration requirement).

In addition to the requirements above, Monitor also has the power to revoke a licence.

The Act provides some more detail about these requirements. For example, it specifies that the monetary penalty may not exceed 10% of turnover in England, as defined in secondary legislation. The Department of Health will be consulting on the definition of ‘turnover’ for this purpose and the consultation document will be available here.

Where we have reasonable grounds to suspect that a provider is in breach of the requirement to hold a licence, or in breach of a licence condition, or in breach of a requirement to provide Monitor with documents and/or information, Monitor may accept an ‘enforcement undertaking’. This may be an agreement from a provider to take an action:

• to ensure a breach does not continue or recur;
• to restore the position to what it would have been had the breach not occurred;
• to benefit another licence holder or a commissioner, where these have been affected by the breach. This could include the payment of a sum of money; or
• as prescribed by Monitor.

Where Monitor has accepted an enforcement undertaking and the provider giving the undertaking has complied with it, no discretionary requirements may be imposed, and a licence may not be revoked. However, where Monitor has accepted an enforcement undertaking and it has not been fully complied with, the powers outlined earlier remain open to Monitor.

Monitor’s enforcement guidelines

We intend to consult on enforcement guidance later in 2012. We are likely to cover our approach to prioritisation, our procedures, and how we make decisions including those areas that the Act says we must cover, which include:

• the circumstances in which Monitor is likely to impose a discretionary requirement;
• the circumstances in which Monitor may not impose a discretionary requirement;
• the matters likely to be taken into account by Monitor in determining the amount of any variable monetary penalty to be imposed including, where relevant, any discounts for voluntary reporting of breaches in respect of which a penalty may be imposed; and
• rights to make representations and rights of appeal.

3.4 Appeals against Monitor’s decisions and objections to changing the licence

Our enforcement guidance will include more information about rights of appeal. In summary, appeals challenging decisions made by Monitor may be made to the First-tier Tribunal – this
includes decisions where Monitor refuses to issue a licence or decides to revoke a licence, or enforcement action decisions. Appeals may be made based on errors of fact, wrong in law, or whether a decision was reasonable. More information on the First-tier Tribunal can be found here.

Should Monitor wish to make changes to the standard conditions in its licence, we must first give notice to a number of parties, including licence holders and clinical commissioning groups. These parties can then make representations to us. If a certain proportion of licensees (defined by number of licensees and by share of supply) object, Monitor cannot make the proposed modification, but may make a reference to the Competition Commission. The Competition Commission will then consider the matter.

The percentage of licensees that would need to object to halt the licence modification process (defined as numbers and by share of supply) will be set out by the Department of Health in secondary legislation. The Department of Health will be consulting on its proposals and the consultation document will be available here.
4. General licence conditions

General licence conditions set out the behaviour which Monitor expects from licensees. We propose that these conditions should apply to all licence holders.

In response to stakeholder feedback we have changed the proposed fit and proper persons test. The details of this are discussed earlier in section 3. As well as being a general licence condition, the fit and proper persons test is also used in the licence application process.

The proposed general conditions for consultation are:

**General condition 1: Provision of information.** This condition contains an obligation for all licensees to provide Monitor with any information we require for our licensing functions.

**General condition 2: Publication of information.** This licence condition requires licensees to publish such information as Monitor may require.

**General condition 3: Payment of fees to Monitor.** The Act gives Monitor the ability to charge fees and this condition obliges licence holders, if requested, to pay fees to Monitor.

**General condition 4: Fit and proper persons.** This licence condition obliges providers to make sure that governors and directors (or equivalent people) are fit and proper.

**General condition 5: Monitor guidance.** This licence condition requires licensees to have regard to any guidance that Monitor issues.

**General condition 6: Systems for compliance with licence conditions and related obligations.** We are consulting on whether to include this condition obliging providers to have a compliance officer and maintain certain systems and processes. We set out three options for consultation, one of which is to not impose this condition at all.

**General condition 7: Registration with the Care Quality Commission.** This licence condition requires providers to be registered with the CQC.

**General condition 8: Patient eligibility and selection criteria.** This condition requires licence holders to set transparent eligibility and selection criteria for patients, and to apply these in a transparent manner.

**General condition 9: Effectiveness, efficiency and economy.** This condition requires licensees to carry out their activities effectively, efficiently and economically.

**General condition 10: Application of Section 5 (Continuity of Services).** This condition places an obligation on licence holders not to unreasonably refuse to provide a service as a CRS service, and sets out how Monitor may resolve any disagreements.

We are also consulting on whether we should remove or retain two conditions that we originally proposed when we engaged with stakeholders on the licence earlier in the year:

- a condition requiring licensees to assist with emergency planning and responses to emergencies; and
- a condition requiring compliance with statutory and other requirements.
4.1 Purpose of the general licence conditions

The General licence conditions set out the behaviour which Monitor expects from licensees, and requirements that are relevant to more than one of the other licence conditions. Often, the General licence conditions reflect obligations which already apply to providers in the Act and the purpose of including these types of conditions is to bring the obligation within the scope of our licence enforcement powers, to assist licensees by locating their obligations in a single document and to assist with enforcement when these obligations are directly related to the licence.

The licence conditions are in Annexe Two.

4.2 Who do these licence conditions apply to?

We propose that the General licence conditions should apply to all licence holders.

4.3 Summary of each licence condition

General condition 1 – Provision of information

This licence condition implements the obligation in the Act for all licensees to provide Monitor with information we require for our licensing functions. Having the obligation in the licence makes the requirement clear to licensees, and creates a more straightforward enforcement route.

The proposed licence condition, like the obligation in the Act, is high level and allows us to request any information for the purpose of our relevant functions. This could include requiring licensees to generate information which is not currently collected. For example, if needed for our regulatory functions, we could require licensees to start measuring their performance against certain benchmarks.

We will of course be mindful of the regulatory burden that the use of such licence conditions may impose, and assess the appropriate level of information to be requested to enable us to fulfil our duties effectively. Each year we will conduct a review of the regulatory burdens we place on licensees, to ensure they are proportionate.

When requesting information under General condition 1, we intend to always specify:

- the information required;
- the timescale in which the information is to be provided; and
- the reasons for the information request.

General condition 2 – Publication of information

This licence condition requires licensees to publish such information as Monitor may require.

Like General condition 1, this obligation is broadly framed. We could require licensees to publish existing information or to generate new information, for example to start measuring their performance in certain areas and publish the results. We might do this, for example, in the context of our duty to protect and promote the right of patients to make choices. Our general use
of this condition may form part of our annual regulatory burden review or, if the impact is significant, may require a regulatory impact assessment before we impose requirements.

**General condition 3 – Payment of fees to Monitor**

The Act and the National Health Service Act 2006 give Monitor powers to charge fees. We will have the power to require payment of fees, by all licensees, relevant to our licensing function. We will also continue to have the power to require payment of fees by NHS foundation trusts for the maintenance of the NHS foundation trust register – the obligation to pay these types of fees is contained in the NHS foundation trust licence conditions.

It is not necessarily the case that Monitor will charge fees and no decision about this has yet been taken. But this condition creates the means by which Monitor could, in part, be funded from fees charged to licence holders.

**General condition 4 – Fit and proper persons**

The fit and proper persons test is discussed in section 3.1.

**General condition 5 – Monitor guidance**

As explained in section 2.3 part of most regulatory systems is made up of guidance from the regulator and this condition requires licensees to have regard to guidance issued by Monitor.

**General condition 6 – Systems for compliance with licence conditions and related obligations**

We intend to ensure that licensees comply with the licence. Our enforcement powers are one tool to help us do so, but we are also consulting on whether licensees should be required to put in place appropriate processes and systems to support compliance with the licence conditions.

**Options and variations that we are considering – General condition 6**

When we engaged earlier this year, stakeholders told us that they were concerned that our original proposals would be too much of a burden. We would like your views on three options for this licence condition, all with different advantages and disadvantages.

- **Option A**: A licence condition setting out our view of appropriate staff, processes and systems, including the requirement to have a Compliance Officer. This option is provided in Annexe Two as option (a) for this condition. The benefit of this condition is that it is very clear to licensees what is required. Having a Compliance Officer may be beneficial, as it will provide a single point of contact for staff and for Monitor compliance matters. The possible disadvantage is that the staff, processes and systems we describe may not be appropriate for all licensees, particularly if our licensees include smaller organisations.

- **Option B**: A licence condition requiring appropriate systems and processes to be in place, and requiring self-certification for this, without Monitor specifying what the systems and processes should be. This option is provided in Annexe Two as option (b) for this condition. This licence condition gives licensees significantly more freedom, but provides less certainty in that licence holders must decide for themselves what systems and processes are appropriate. This is Monitor’s preferred option.
- **Option C**: No licence condition, relying on the existence of Monitor’s enforcement powers to be a sufficient incentive for licensees to put in place the appropriate staff and processes. This approach may appear to impose the lowest up-front regulatory burden. However, in practice it may be more costly than it appears, with additional costs incurred in more enforcement cases as Monitor attempts to create a culture of compliance through taking and publicising more enforcement cases.

**Chapter 4 Q1:** Which of the three options for General licence condition 6 do you think will bring about the best outcome? In answering this question, please note the interaction with Monitor’s proposal not to include a General licence condition requiring compliance with other legal obligations.

**General condition 7 – Registration with the Care Quality Commission**

This condition reflects the obligation in the Act for providers, where required, to be registered with the CQC. This condition allows Monitor to withdraw the licence from providers required to register with the CQC if their CQC registration is lost, and they therefore cannot continue to lawfully provide services. The condition also requires licensees to inform Monitor of modifications to the terms of their registration.

**General condition 8 – Patient eligibility and selection criteria**

This condition requires licensees to set and publish transparent patient eligibility and selection criteria and to apply these in a transparent manner. The Act specifically requires us to include this condition in the provider licence.

**General condition 9 – Effectiveness, efficiency and economy**

This condition requires licensees to carry out their activities effectively, efficiently and economically. It is part of Monitor’s main duty to promote the provision of health care services for the NHS which are effective, efficient and economic. To help fulfil this duty we intend to develop a system of information, incentives and enforcement which supports providers in becoming more effective, efficient and economic over time. There is, however, likely to be a period of time before all of the elements of the regulatory system are in place and work well. Before the system is fully developed it may be appropriate for Monitor to intervene if there is a significant detrimental impact to the interests of patients as a result of a provider being ineffective, inefficient or uneconomic.

**Options and variations that we are considering – General condition 9**

We are considering whether this licence condition is necessary. The arguments for removing the licence condition might include that it may be an inappropriate extension of scope for Monitor to intervene where a provider may not be operating effectively, efficiently and economically, and Monitor’s focus should be on developing an effective regulatory system. We are currently minded, however, to conclude that the condition should be included in the final licence because, as explained above, we can envisage scenarios in which other regulatory levers are not working effectively. Then Monitor should appropriately intervene in the interests of patients where a provider is ineffective, inefficient or uneconomic.
Chapter 4 Q2: Do you think Monitor should include a licence condition requiring licensees to carry out their activities effectively, efficiently and economically?

General condition 10 – Application of Section 5 (Continuity of Services)

This condition is the only Continuity of Services condition that applies to all providers. It is described later in the document in section 8, alongside the rest of the Continuity of Services conditions.

Options and variations that we are considering – removing licence conditions

We believe that any unnecessary regulation may have undesirable effects, such as additional burdens on providers or an increase in regulatory uncertainty about how a licence condition may be used where the purpose of a condition is not completely clear. Because of this, we looked at all the licence conditions that we originally proposed to make sure that we still thought they were all necessary.

When we engaged with stakeholders earlier this year, we included two licence conditions which we are now considering not including in the licence - subject to the views of stakeholders or any points that come to light that would suggest that the benefits of these conditions outweigh the potential costs. We have set out our reasons below. If you feel that it is important for these licence conditions to be retained, please let us know why, and we will consider all comments before reaching a final view.

The two conditions are:

- **The condition requiring licensees to assist with emergency planning and responses to emergencies.** For many public bodies, an obligation like this is already contained in the Civil Contingencies Act 2004. In our view, the decision to extend this requirement to other providers of NHS-funded services is a decision for commissioners. We believe commissioners should require such assistance through contracts, if they decide it is needed. It may be argued, however, that including the requirement in the licence gives a greater degree of certainty, which would be appropriate. We are obviously keen to hear the views of both providers and commissioners on this point.

- **The condition which obliges compliance with statutory and other requirements.** The original intention behind this condition was not to create an enforcement role for Monitor for legislation that is within the remit of other bodies, but rather to give Monitor the ability to revoke a provider’s licence if it was in serious breach of its other obligations. On reflection, we think that a better way to achieve our objective is to include within Monitor’s preferred option b in General condition 6 an obligation for licence holders to have appropriate systems and processes in place to ensure compliance with all of their legal obligations.

Chapter 4 Q3: Do you think Monitor should include in the final licence:

a) A condition requiring licensees to assist with emergency planning and responses to emergencies? b) A condition which obliges compliance with statutory and other requirements?

In answering question b), please note the interaction with Monitor’s proposal for general condition 6.
4.4 Listening to stakeholders

From the responses we received on the provider licence when we engaged with stakeholders earlier in 2012, we identified four key themes about the General conditions. These are summarised below, with an explanation about how these concerns have now been addressed.

Regulatory burden

Some of our stakeholders raised concerns that the licence application process might create a lot of extra work for providers. We are determined to make sure this is not the case and are working hard, alongside the CQC, to make the licence application and issuing process as streamlined as possible (and as we have explained earlier, NHS foundation trusts will not have to apply for a licence).

In addition, the licence application criteria we have developed are appropriately weighted and should not represent a significant barrier to obtaining a licence. We have listened to stakeholders’ views about the scope of the fit and proper persons test and our proposed changes reflect stakeholders’ comments.

Overlap with other regulations

Where our licence criteria overlap with those of other regulators or legislation, for example, the Companies Act, stakeholders asked us to explain why. Our proposal is that the licence application process will be on a self-certification basis. Unless something prompts us to do so, we would not normally expect to check the backgrounds of directors and governors, who may have already been checked by other bodies. But it is appropriate that obtaining or continuing to hold a Monitor licence is conditional on the criteria being met.

Assessing compliance and enforcing the conditions

Respondents asked for more detail about how we will assess providers’ compliance with the licence conditions, and how we will decide whether to take action to enforce the conditions. We plan to publish guidance in the autumn in the form of our draft Risk Assessment Framework which will outline our approach to compliance with the Continuity of Services and NHS foundation trust licence conditions in particular. Our initial thoughts are outlined at a high level in Annexe One. Around the same time, we plan to publish guidance on our approach to enforcement. Our initial thoughts are outlined at a high level in section 3.

Compliance with the fit and proper persons test

Stakeholders raised some concerns about the number of people that would have to comply with the fit and proper persons requirements. In response, we have proposed to limit this to directors and governors, or those performing equivalent functions.
In future, Monitor will be responsible, jointly with the NHS Commissioning Board, for the pricing of NHS services. We are proposing five licence conditions to help us fulfil this duty. We propose that the Pricing licence conditions apply to all licensees that are covered by the National Tariff document.

The Pricing licence conditions remain broadly the same as those we included when we engaged with stakeholders earlier in the year. We received stakeholder comments about the data we will need to collect, and we respond to those comments in this document, but we did not consider that we needed to make any changes to the conditions that we originally proposed.

The proposed Pricing conditions for consultation are:

**Pricing condition 1: Recording of information**

Under this licence condition, Monitor can require licensees to record information (including information on their costs) in line with guidance to be published by Monitor.

**Pricing condition 2: Provision of information**

Having recorded the information in line with Pricing condition 1 above, licensees can then be required to submit this information to Monitor.

**Pricing condition 3: Assurance report on submissions to Monitor**

When collecting information for price setting, it will be important that the information submitted is accurate - this condition allows Monitor to oblige licensees to submit an assurance report confirming that the information they have provided is accurate.

**Pricing condition 4: Compliance with the National Tariff**

The Act requires commissioners to pay providers a price which complies with, or is determined in accordance with, the National Tariff for NHS health care services. This licence condition imposes a similar obligation on licensees, i.e. the obligation to charge for NHS health care services in line with the National Tariff.

**Pricing condition 5: Constructive engagement concerning local tariff modifications**

The Act allows for local modifications, or adjustments, to prices. This licence condition requires licence holders to engage constructively, and to try to reach local agreement, with commissioners before applying to Monitor for a modification.
5.1 Purpose of the Pricing conditions

One of Monitor’s new functions will be to set prices for health care services funded by the NHS. Accurate pricing is essential to ensure that providers are paid appropriately for services they provide to patients. Accurate pricing information helps GPs, commissioners and providers to plan and budget for health care services to meet people’s needs. Pricing can also be used to encourage providers to improve the quality of services for patients, and to increase the efficiency with which services are provided. If providers are not properly reimbursed, this can reduce the quality and efficiency of care they offer and may, in some circumstances, threaten the sustainability of their services.

We will be working closely with the NHS Commissioning Board on pricing. The NHS Commissioning Board will lead on determining the currencies, or products, for which Monitor will set the prices.

Setting prices is not new to the NHS. Monitor and the NHS Commissioning Board will be taking over pricing responsibility from the Department of Health. The intention is for responsibility to transfer to Monitor and the NHS Commissioning Board with effect from the 2014/15 tariff.

Monitor will consult on the draft National Tariff document, and stakeholders will be able to agree with, or object to the pricing methodology being proposed. If the number of objections from relevant providers or commissioners reaches a certain threshold, Monitor will need either to reconsider the proposed methodology or to refer it – and the objections received – to the Competition Commission.

The Department of Health will be consulting on pricing and objection thresholds in autumn 2012. This will define a ‘relevant provider’ for the purposes of the pricing process, and specify the threshold for referring disputed pricing methodologies to the Competition Commission.

The Pricing licence conditions can be found in Annexe Two.

5.2 Who do these licence conditions apply to?

We propose that the Pricing licence conditions will apply to all licensees that are covered by the National Tariff document. The National Tariff document is defined in the Act as a document published by Monitor and agreed with the NHS Commissioning Board which specifies national prices, rules for local variations to national prices, local modifications, and any other rules for paying for the provision of a health care service for the purpose of the NHS.

5.3 Summary of each licence condition

Pricing condition 1 – Recording of information

Using this licence condition, Monitor may require licensees to record information (including information on their costs) in line with approved guidance that we will publish. The licence condition is drafted so that the cost and other information that may be collected covers both licensees and their sub-contractors.

This licence condition may also require licensees to record other information, which may include quality and outcomes data, in line with our guidance and for the purposes of carrying out our pricing functions.
The reason for having a separate licence condition, in addition to the General condition, about the recording of information is to facilitate prompt and straightforward compliance with Pricing licence condition 2. If information on costs was not recorded as required, it could be difficult for licensees to provide it to us at the time requested.

**Pricing condition 2 – Provision of information**

Having recorded the information in line with Pricing condition 1 above, licensees can then be required to submit this information to Monitor.

Having access to consistently recorded and accurate information, particularly on the costs of providing NHS services, will be important to us. In the absence of such information, it will be very difficult to set appropriate prices.

**Pricing condition 3 – Assurance report on submissions to Monitor**

It will be important that the information we collect for setting prices is accurate. For this reason, we have included Pricing condition 3 under which, licensees may be required to submit an assurance report confirming the accuracy of the information they have provided.

We are aware that the requirement to submit such an assurance report will carry associated costs. We will consider this when deciding whether to ask for such assurance reports, and will only require them where we believe the benefits in terms of assurance about data accuracy outweigh the costs.

**Pricing condition 4 – Compliance with the National Tariff**

The Act requires commissioners to pay providers a price which complies with, or is determined in accordance with, the National Tariff for NHS health care services. This licence condition imposes a similar obligation on licensees, i.e. the obligation to charge for NHS health care services in line with the National Tariff.

In practice, the existence of this licence condition should not make much difference to licensees, given the obligation the Act places on commissioners. However, including this condition in the licence makes licensees’ obligations clear, and provides a straightforward enforcement route for cases in which providers do not adhere to the National Tariff.

It is important to remember that national prices are currently prepared by the Department of Health and will continue to be so until there is a transition to the National Tariff prepared by Monitor. The Act defines the National Tariff as a document published by Monitor, so Pricing condition 4 does not apply until Monitor publishes the National Tariff.

**Pricing condition 5 – Constructive engagement concerning local tariff modifications**

While we will aim to develop prices which reflect appropriate costs for providers, we understand that in some circumstances it would be uneconomic for a provider to offer a particular service without additional funding over and above the National Tariff. For this purpose, the Act allows for local modifications, or adjustments, to prices.

The Act gives us responsibility for setting the processes and rules around local modifications. We have published a report setting out research and a potential approach in this area. The report is available [here](#).
The purpose of this licence condition is to require licensees to engage constructively, and to try to reach local agreement, with commissioners prior to applying to Monitor for a local modification. It seems reasonable to require providers to try to negotiate locally first, following guidance which we will set out, rather than to apply directly to Monitor for a decision without having first tried to reach agreement. A licence condition means we can make this expectation clear and encourage compliance with it. Although local agreement subject to our approval is likely to be the most desirable approach, it will still be possible for providers to apply to us for determination where an agreement has not been reached.

5.4 Listening to stakeholders

From the responses we received to our earlier engagement on the provider licence, we identified four key themes about the Pricing conditions. These are summarised below, with an explanation about how these concerns have now been addressed.

Costs associated with submitting data to support the National Tariff

Stakeholders raised concerns about the extra cost and workload involved in submitting data to support the National Tariff. Our plans for defining and improving the costing data that will underpin future pricing are at an early stage. We are working with stakeholders to make sure that the cost of providing us with data is kept to the minimum necessary while ensuring that we can carry out our duties effectively. We will work with other organisations to ensure that we avoid duplication wherever possible and that best use is made of information that is already collected.

Process of submitting data to support the National Tariff development

Some stakeholders were concerned about the process of submitting data to support the development of the National Tariff. As our approach to costing and pricing develops over the next few years we will continue to engage with stakeholders on our approach to data collection.

Assurance requirements

Stakeholders had questions about assurance requirements for data submissions to support the National Tariff. We recognise that assurance reports might be more expensive than a system based on self-certification alone. However, independent verification of the quality and reliability of the data may help to ensure that prices are set on a firmer footing. As the system develops, we intend to consider a range of different assurance options and the costs and benefits of each option and will consult as appropriate on specific requirements. If we decide that external reports are necessary, we will consider whether they will be a requirement for all providers or used selectively. Our approach will be guided by the need to be proportionate, transparent and consistent, and the need to encourage providers to collect and submit high-quality data.

Provider and commissioner agreement on local price modifications

Some stakeholders asked if it was necessary to have a licence condition that compels providers to engage with commissioners to agree local price modifications. There is clear provision in the Act for local modifications to be based on agreement. A licence condition means we can make this expectation clear and encourage compliance with it. Also, as local modifications involve increases in prices only, it is likely that they will be initiated by providers rather than commissioners. Therefore it seems reasonable to require providers to try to negotiate locally with commissioners, rather than to apply directly to Monitor at the outset.
6. Choice and Competition licence conditions

Our proposed patient choice and competition licence conditions allow us to protect and promote patient interests by supporting patient choice of provider and, where it is in the interests of patients, take action against anti-competitive behaviour.

We propose that these conditions apply to all licence holders, apart from condition 3, which applies only to NHS foundation trusts.

There have been some changes to the conditions we included in our engagement documents earlier in the year. In the proposed patient choice condition, we have removed references to some codes of conduct and we have redrafted the condition to make it clearer.

In the competition oversight condition, we have removed reference to ‘choice’ because the amendments to the choice condition now cover our objectives. We have redrafted the condition to create a clearer distinction between anti-competitive agreements and anti-competitive conduct and to make the user interest test clearer.

The proposed choice and competition conditions for consultation are:

Choice and Competition condition 1: The right of patients to make choices

This condition protects patients’ rights to choose between providers by obliging providers to make available information and act in a fair way where patients have the right to choose a provider. We are consulting on whether to include an additional clause that would require licensees, in certain circumstances, to ensure that patients are offered impartial advice about the choices available.

Choice and Competition condition 2: Competition oversight

This condition prevents providers from entering into or maintaining agreements that have the object or effect of preventing, restricting or distorting competition, to the extent that it is against the interests of health care users. It also prohibits the licensee from engaging in other conduct which has the effect of preventing, restricting or distorting competition to the extent that it is against the interests of health care users.

Choice and Competition condition 3: Informing the Office of Fair Trading of mergers

This condition would require licence holders to inform the OFT of mergers with other businesses that provide health care services before the mergers are completed. It would apply only to NHS foundation trusts.

We also intend to remove a condition that we originally proposed when we engaged with stakeholders earlier in the year:

- A condition requiring a review by Monitor of mergers involving NHS trusts
6.1 Purpose of the Choice and Competition licence conditions

Monitor’s proposed licence conditions support patients’ rights to make choices about their health care provider. In and of itself, being able to choose a provider can give direct benefits to patients. Effective patient choice can also be a key source of competitive pressure on providers and can provide incentives for higher quality and more efficient provision of care. For choice to be effective, however, patients need to be well informed about the choices that are available to them. They need to know when they have the right to make choices, what choices are available, and how the different options compare.

Under the Act, we must exercise our functions with a view to preventing anti-competitive behaviour in the provision of health care services which is against the interests of people who use health care services. The Act allows us to apply the Competition Act 1998, concurrently with the OFT. But the provisions of the Competition Act only apply to the behaviour of organisations when they are acting as ‘undertakings’, and there are some organisations in the health sector that may not be behaving as ‘undertakings’ under the Competition Act in relation to everything they do. The introduction of a competition oversight licence condition serves to fill the potential enforcement gap under the Competition Act as it will apply to all licensees.

The Competition oversight condition will also provide an alternative procedural route which will allow Monitor to adopt flexible, efficient and proportionate approaches to enforcement, within the requirements of due process, to the benefit of patients, licensees and Monitor.

The Choice and Competition licence conditions sit within a broader set of regulatory arrangements that will affect patient choice including, for example, the regulations setting rules for commissioners on procurement, choice and competition. The Department of Health’s consultation on these regulations will be available [here](#).

The existing Principles and Rules for Cooperation and Competition (PRCC) already include provisions relating to patient choice, competition and mergers. The licence conditions are intended to put existing requirements, where relevant, on a more formal footing. The existing PRCC can be found [here](#).

The Choice and Competition licence conditions can be found in Annexe Two.

6.2 Who do these licence conditions apply to?

We propose that the Choice and Competition conditions 1 and 2 will apply to all licensees. The third licence condition, requiring the OFT be informed of mergers, would apply only to NHS foundation trusts.

6.3 Summary of each licence condition

**Choice and Competition condition 1 – The right of patients to make choices**

This proposed condition:

- requires licensees to notify patients when they have a right of choice of provider, and to tell them where they can find information about the choices they have. This must be done in a way that is not misleading;
• requires that information and advice that licensees provide to patients about their choice of provider does not unfairly favour one provider over another and is presented in a manner that helps patients to make well-informed choices; and

• prohibits licensees from offering inducements for patient referrals or the commissioning of services.

Our proposed condition sets out some basic requirements relating to information and behaviour. Under the condition, licensees would not be required to provide advice to patients on making choices, but would not be prevented from doing so. Where advice is provided, it should not unfairly favour one provider over another and should be presented in a way that helps patients to make well-informed choices.

We intend to develop guidance to explain the standards that we would require for information and advice under the condition. For example, we might require that any information or advice provided to patients should be accurate, accessible, and – as appropriate – representative and, as far as reasonably practicable, complete. Existing relevant standards are set out in parts of the Department of Health Code of Practice for the promotion of NHS-funded services, and we intend to take these standards as the starting point for our guidance. The guidance is likely to be available in 2013.

Changes made following our engagement with stakeholders

The version of the patient choice condition that we engaged upon with stakeholders earlier in the year included a requirement for licensees to publish information. We have removed this from the proposed patient choice condition, as it is now covered by General condition 2. We have also removed a requirement to make available information to the Department of Health and commissioners. This is because we think that the combination of General condition 1 and 2 provide a sufficient basis to address any problems about the availability of information.

The version of the patient choice condition that we engaged with stakeholders on included a requirement that licensees comply with the Code of Conduct of the Advertising Standards Authority and the Code of Practice for the promotion of NHS-funded services. Having considered the condition further, we have removed this requirement from our proposal. The two codes contain some information that may not be relevant to NHS providers, and the development of these documents would fall outside of the licensing framework and beyond Monitor’s control.

As discussed above, some parts of the Code of Practice for the promotion of NHS-funded services will provide a starting point for our guidance. The existing Code of Practice also includes a provision that relates to promotional activity that would not be captured by other parts of the licence condition – prohibiting the offering of inducements for patient referrals or the commissioning of services. We think that it is appropriate to include this existing requirement in the licence condition, as this would provide an enforcement mechanism with which we could address situations where inducements were offered in ways that might distort patient choice.

Options and variations that we are considering – Choice and Competition condition 1

We are consulting on whether it would be appropriate for the proposed condition to include a more ‘structural’ provision. The licence condition could require that where a patient has a choice of provider, and where the provider responsible for giving advice is itself a provider of some
services that the patient could choose, then the licensee must make arrangements to ensure that the patient is offered impartial advice about the choices that are available. This would effectively provide for the separation of the role of adviser and subsequent provider in contexts where those roles might otherwise be in conflict. A draft of this potential additional condition has been included in Annexe Two for reference. This option has been developed on the basis of Co-operation and Competition Panel (CCP) casework in which gatekeeper conflict of interest issues arose (see Option B in Annexe Two).

We welcome views and comments on the merits of this option. The CCP found in one case here that the costs of such a requirement were not disproportionate, and that in the circumstances considered the introduction of an independent adviser was an effective safeguard to ensure objective advice about choice for patients who require onwards referral. Introducing the obligation generally, however, for all licence holders may impose greater burdens, and we are keen to make sure that we consider carefully the burdens compared to the benefits both overall and for different types of provider. That said, it may be the case that for most types of provider, there are ways in which patients could be directed to impartial advice with relatively low cost, in which case the requirement may be proportionate if applied to all licence holders.

**Chapter 6 Q1: Do you think Monitor should include in the choice licence condition a requirement that, where the provider responsible for giving advice is itself a provider of some services the patient could choose, then the licensee must make arrangements to ensure that the patient is offered impartial advice about the choices that are available? Please set out how you see the costs and benefits of this option.**

**Choice and Competition condition 2 – Competition oversight**

This condition would prohibit the licensee from entering into or maintaining agreements that had the object or effect of preventing, restricting or distorting competition, to the extent that it is against the interests of health care users. It would also prohibit the licensee from engaging in other conduct which has the effect of preventing, restricting or distorting competition, to the extent that it is against the interests of health care users.

We intend to develop guidance to explain how we plan to enforce the condition which will give stakeholders a better understanding of the types of behaviour that would be prohibited or allowed by the proposed condition. We expect our approach to involve using economic methods similar to those used to assess behaviour under competition law. These are set out in existing guidance that is produced by, for example, the OFT – which can be found here. Our guidance will provide further details of the framework that we would use when assessing particular behaviour. We expect this guidance to be available in 2013.

*Changes made since our engagement with stakeholders*

Our proposed competition oversight condition is similar to the version that we engaged with stakeholders on earlier in 2012, although we have made a number of changes aimed at providing a simpler and clearer condition that is better aligned substantively with competition law. In particular:

- We have separated the prohibition for agreements from that for individual conduct, in order to align the approach with an important distinction in competition law. Organisations should not enter into agreements which have either the object or the effect of restricting
competition. They should also not engage in abusive unilateral conduct which restricts competition.

- We have introduced a simpler interest test that focuses on whether behaviour is against the interests of people who use health care services.
- We have removed the reference to patient choice. Our proposed condition now focuses only on competition impacts, and patient choice issues are addressed separately through the patient choice licence condition.

Options and variations that we are considering – Choice and Competition condition 2

Our proposed competition oversight condition is what regulators call an ‘ex post’ prohibition. As with competition law, it establishes a broad prohibition of anti-competitive conduct, and the regulator must assess conduct in particular cases to decide whether it is anti-competitive after the event. An alternative type of condition can require licensees to do or not do particular things to ensure compliance. These are referred to as ‘ex ante’ conditions, because specific conduct requirements are set out in advance. For example, regulators sometimes require companies to implement measures that can make it easier for customers to switch suppliers such as specific requirements about information provision.

We have considered the potential benefits of developing ex ante licence conditions for competition that involve specified conduct requirements. However, for such conditions to be effective, the particular issues of anti-competitive behaviour that they are intended to address need to be well understood, so that the conditions can be developed in a targeted and proportionate manner. While the Co-operation and Competition Panel’s casework has provided some case experience of particular competition problems that have emerged, this is still very much a developing body of experience. We therefore think that it is too early to develop more specific ex ante licence requirements related to competition but hold the view that, in the future, to do so may be beneficial and we may propose changes to the licence on this at a later date.

Choice and Competition condition 3 – Informing the Office of Fair Trading of mergers

This condition would require the licensee to inform the OFT of mergers with other businesses that provide health care services before they are completed. It would apply only to NHS foundation trusts.

The Enterprise Act 2002 gives companies the flexibility to complete mergers and start integrating without having to notify the OFT, or wait for clearance that the merger has not been found to give rise to competition problems that need to be remedied. However, where companies use this flexibility, there is a risk that the OFT may intervene at a later stage, and that the merger may need to be reversed or modified in some way if it has been found to result in competitive harm. Under the Enterprise Act, it is for companies to assess how significant this risk is, and to bear the costs of reversing or modifying a merger, should that be required.

Under the Act, a licence condition may be used to require NHS foundation trusts to notify the OFT of mergers ahead of completion. The reason for this is that NHS foundation trusts may have limited awareness of the UK merger control regime, because the extent to which it applies to them has been unclear to date. Given this lack of awareness, there is a risk that NHS foundation
trusts may not initially make fully informed judgements on whether to notify the OFT of mergers. This could result in NHS foundation trust mergers having to be reversed at high cost.

**Options and variations that we are considering - Choice and Competition condition 3**

The proposed condition would provide a relatively low-cost way of encouraging NHS foundation trusts to engage with the OFT at an early stage. However, the extent of the risk that the condition is intended to mitigate is unclear. The risk that without such a condition NHS foundation trusts would fail to notify the OFT may itself be limited. Also, the OFT routinely monitors markets and may pick up major planned mergers even where NHS foundation trusts had not notified them. So while the costs of the condition would be relatively limited, the benefits may also be relatively limited.

We would like your comments on whether the risks of NHS foundation trusts not notifying the OFT, and of this resulting in costs from mergers having to be modified or reversed, are considered sufficient to justify the condition. We would also like to invite comments on whether an alternative approach that simply involved Monitor informing NHS foundation trusts of the OFT’s merger controls could provide a more appropriate means of addressing these risks.

**Listening to stakeholders**

Stakeholders told us that the scope of the provision should be narrowed. We now propose that the condition should only apply to mergers with other businesses that provide health care services. This would avoid licensees having to notify the OFT of minor transactions such as, for example, the purchase of a catering business.

**Chapter 6 Q2: Do you think a licence condition that requires NHS foundation trusts to notify the Office of Fair Trading of mergers with other businesses that provide health care services before they are completed is necessary and has benefits?**

**Intention to remove a condition originally proposed**

In our stakeholder engagement document, we included an additional licence condition which provided for the review by Monitor of mergers involving NHS trusts. This draft condition was developed before the Bill became an Act, but the Act as passed does not provide a legal basis for merger approval by Monitor for NHS trusts. Given this, we are not including this proposed condition in the final licence.

There is some uncertainty over the merger control arrangements that would apply to NHS trusts. The Act made it clear that NHS foundation trusts would be treated as ‘enterprises’ and would therefore be subject to the OFT’s general merger controls under the Enterprise Act. However, the Act did not designate NHS trusts as enterprises, and it is not clear whether general merger controls would apply to NHS trust mergers in all cases. The Secretary of State will continue to decide whether to permit NHS trusts to complete mergers, and has indicated previously that, where the OFT merger controls do not apply, advice will be sought from Monitor on the impact of the merger on competition before reaching a final decision – this intention was set out in the Department of Health’s 2010 publication Liberating the NHS: Legislative framework and next steps.
6.4 Listening to stakeholders

From the responses we received when we engaged on the provider licence with stakeholders earlier this year, we identified two key themes about the Choice and Competition conditions. These are summarised below, with an explanation about how these concerns have now been addressed.

Uncertainty about how the competition oversight conditions would be applied in practice

Some stakeholders wanted us to provide guidance to clarify how the competition oversight licence conditions would be applied in practice. The existing casework of the Co-operation and Competition Panel is a good indication of Monitor’s likely approach although of course the competition oversight regime will continue to evolve over time. We recognise that the way we apply our proposed licence conditions will be important. We will develop, consult on, and issue guidance to help stakeholders understand the types of behaviour that may not be permitted by the licence conditions.

Informing the OFT about mergers and the role of different regulatory bodies in scrutinising mergers

Stakeholders had mixed opinions about the requirements to inform the OFT about mergers and there was some confusion about the role of different regulatory bodies in scrutinising mergers. In response we have now narrowed the scope of Competition and Choice condition 3 so it does not capture minor transactions, for example those involving catering facilities. We have deleted the draft condition related to the review of NHS trust mergers, and clarified that we see Monitor’s role as providing advice on such mergers when requested to do so by the Secretary of State.
Monitor’s Integrated Care licence condition is informed by a detailed report that we published after the stakeholder engagement on the licence earlier this year. The report examined how Monitor might best interpret its duties, and use its powers, to enable integrated care. The report considered in some detail the role that Monitor might play alongside providers and commissioners, and others, in enabling integrated care for the benefit of patients.

We propose that the Integrated Care condition should apply to all licence holders.

We have changed our proposed condition on integrated care since our earlier engagement with stakeholders – this is because of the findings of our research report. We originally proposed a condition that set out certain circumstances where providers must co-operate with other providers and with commissioners. However, we now think that the obligation should be broader and less specific.

**We are consulting on three options for the Integrated Care condition:**

- **Option A**: A positive obligation - the licensee shall take all reasonable steps as necessary for the purpose of enabling integrated care;

- **Option B**: A broadly defined prohibition - the licensee shall not do anything that would reasonably be regarded as detrimental to enabling integrated care; or

- **Option C**: A prohibition on actions that might block - the licensee shall not unreasonably block the integration of care.

Monitor’s preferred option is B, a broadly defined prohibition - this leaves appropriate room for providers and commissioners to lead in developing integrated care.
7.1 Purpose of the Integrated Care licence condition

The Act gives Monitor a duty to enable integrated care where this improves quality or efficiency, or reduces inequality. We commissioned research on integrated care from Frontier Economics, the Nuffield Trust, The King’s Fund and Ernst & Young. We asked these organisations to help us define integrated care, identify the ways in which it might benefit users of health care services, and outline the enablers and barriers for the delivery of integrated care. The research report is available here.

As part of this work, initial recommendations were produced on how we could use our tools and powers to best enable the delivery of integrated care. The research found that we could make significant contributions through our roles in relation to setting prices, and by generally aligning most of our functions bearing in mind the potential impact on integrated care. We could, for example, ensure prices create incentives for integrated care, and take integrated care solutions into account in our Continuity of Services framework.

The research also found that it would be helpful to have a licence condition about integrated care, to make clear to licensees the importance we attach to our role and to enable us to take action where there are problems with the delivery of integrated care. This is in line with our view, following the research report, that the main role for Monitor is one where we support commissioners and providers, as they are the groups who need to take the lead in developing integrated care solutions.

The Integrated Care licence condition can be found in Annexe Two.

7.2 Who does this licence condition apply to?

We propose that the Integrated Care licence condition will apply to all licensees.

7.3 Summary of the licence condition

Integrated Care condition 1 – Provision of integrated care

The purpose of this licence condition is to enable Monitor to step in where integrated care is not being delivered for the benefit of health care service users, in spite of decisions and efforts made by commissioners.

In most cases, we would expect integrated care to be delivered locally through commissioners specifying their requirements and working together with providers. The requirement for care to be delivered in an integrated way would be captured in contracts, and our policies in areas such as pricing and competition would act as our main tools for enabling integrated care.

However, to deal with what we expect to be rare cases of integrated care not being delivered locally due to actions taken, or not taken, by one particular provider, we propose including a condition in the licence imposing obligations on providers.

We have developed three options for potential licence conditions – these are set out in Annexe Two:

- **Option A**: A positive obligation - the licensee shall take all reasonable steps as necessary for the purpose of enabling integrated care;
• **Option B**: A broadly defined prohibition - the licensee shall not do anything that would reasonably be regarded as detrimental to enabling integrated care; or

• **Option C**: A prohibition on actions that might block - the licensee shall not unreasonably block the integration of care.

In our view, option B is preferable. Our concern with option A is that it might create a very broad spectrum for potential regulatory action, inhibiting commissioners and providers in driving integration locally, with the potential for many different opinions around what could reasonably be regarded as necessary for the delivery of integrated care. That said, Option A has some advantages, not least that it is a positive obligation on providers to act. But we think that it may be appropriate to move towards such a condition in the future, as the essential elements of integrated care solutions that bring benefits to patients become clearer.

In contrast, our concern with option C is that it is too narrowly defined, and there may be instances of integrated care not being delivered, without a licensee necessarily taking specific actions to block integrated care. In addition, the specific requirement to ‘block’ could potentially create a very high hurdle to regulatory action.

*Listening to stakeholders*

When we engaged on the licence earlier in the year, some stakeholders said they were worried about a conflict between an Integrated Care condition and a Competition Oversight condition. We acknowledge that there may be a perception of a conflict, and in time we intend to develop guidance to make sure that integrated care is not being harmed by such fears. In reality though, we believe that the real risk of a conflict is small. The Competition Oversight condition prohibits any anti-competitive agreement or conduct ‘to the extent that it is against the interests of people who use health care services’. So in order for a conflict to arise, there would have to be some behaviour that is needed for integrated care and this behaviour is against the interests of users of health care services. This seems unlikely. While we are developing our guidance, we would be more than willing to hear from any provider who is holding back from engaging in specific integrated care initiatives because of a fear of breaching competition requirements. In these circumstances, if practical, we will consider giving informal guidance on the issues raised.

*Options and variations that we are considering*

We currently think that option B represents the best way forward – but we are keen to hear your views on this proposal.

**Chapter 7 Q1**: Which of the three options for the Integrated Care licence condition do you think will bring about the best outcome?

We are also considering whether we should include additional wording in the licence condition to include a patient interest test, similar to the test included in the Choice and Competition licence condition 2 see section 6. Our view is that this test may already be captured by the objectives specified in the proposed Integrated Care licence condition, that is, integrated care should only be enabled where it improves quality or efficiency, or reduces inequality, but we would be grateful for stakeholder views on this point.

**Chapter 7 Q2**: Do you think the Integrated Care condition should include a patient interest test?
7.4 Listening to stakeholders

From the responses we received when we engaged with stakeholders earlier in the year, we identified four key themes about the Integrated Care conditions. These are summarised below, with an explanation about how these concerns have now been addressed.

The licence condition requiring organisations to cooperate may be unnecessary

Some stakeholders were concerned that the licence condition that requires organisations to cooperate may be unnecessary. We agree with stakeholders that commissioners and providers locally should be in the lead when it comes to the delivery of integrated care. We have redrafted the licence conditions, and think in particular that option B makes Monitor’s role clear.

Consistency with competition guidance

Some stakeholders were concerned about whether these conditions were consistent with competition guidance. We understand that there may be a perception of a conflict between the Competition Oversight and Integrated Care conditions that we should be proactive about addressing. However, we believe the risk of an actual conflict is small.

The licence condition requiring organisations to cooperate needs to be clearer

Stakeholders felt the licence condition that requires organisations to cooperate needs to be clearer if it is to be included in the final provider licence. In developing option B it was our intention to make things clearer by moving away from a positive obligation to cooperate. It is difficult to be very specific at this stage in an integrated care licence condition about the types of new or additional behaviours which are required, particularly at a time when many integrated care initiatives are still at an early stage, and final solutions can be expected to differ area by area. We will be mindful of when we can provide more guidance on this.

The role of primary care and social care providers in the development of integrated care

Some respondents felt that it was essential for primary care and social care providers to be engaged in the development of integrated care. They were concerned that such providers could fall outside of the remit of the proposed licensing system. The Department of Health will soon be consulting on draft exemption regulations, which will specify which providers are likely to be exempted from the requirement to be licensed.
8. **Continuity of Services licence conditions**

Our Continuity of Services licence conditions allow us to protect and promote patients’ interests by ensuring that vital services continue to operate if a provider becomes financially distressed or insolvent.

We propose that these conditions would apply to all licensees that provide Commissioner Requested Services – although note the related General Condition 10, which would apply to all licence holders. There have been some significant changes to the conditions following our stakeholder engagement. In particular, providers will not be required to obtain an external credit rating, but instead Monitor will calculate a risk rating using its own methodology.

The proposed Continuity of Services conditions for consultation are:

**General condition 10: Application of Section 5 (Continuity of Services)**. This condition puts an obligation on providers not to unreasonably refuse to provide a service as a CRS. This condition would apply to all licence holders.

**Continuity of Services condition 1: Continuing provision of Commissioner Requested Services**. This condition specifies that licensees are only subject to the Continuity of Services licence conditions if they provide Commissioner Requested Services. It also ensures the continued operation of Commissioner Requested Services.

**Continuity of Services condition 2: Restriction on the disposal of assets**. This licence condition ensures that licensees keep an up-to-date register of all the relevant assets used in the provision of Commissioner Requested Services and that they cannot dispose of, or relinquish control over, any assets on that register without Monitor’s consent.

**Continuity of Services condition 3: Monitor Risk Rating**. This condition requires licensees to have due regard to adequate standards of corporate governance and of financial management.

**Continuity of Services condition 4: Undertaking from the ultimate controller**. This condition requires licensees to put in place a legally enforceable agreement with their ‘ultimate controllers’. This agreement would require ultimate controllers to refrain from taking any action that would cause licensees to breach the licence conditions.

**Continuity of Services condition 5: Risk pool levy**. This licence condition requires licensees to contribute towards the funding of an insurance mechanism for special administration costs - the risk pool – if required.

**Continuity of Services condition 6: Cooperation in the event of financial stress**. This licence condition applies when a licensee fails to meet the test of sound financial management as set out in Continuity of Services condition 4 and as implemented under Monitor’s accompanying Risk Assessment Framework.

**Continuity of Services condition 7: Availability of resources**. This condition requires licensees to act in a way that secures access to the resources needed to operate Commissioner Requested Services.

We are also consulting on proposals to remove conditions that we originally proposed:

- a condition restricting levels of indebtedness;
- a condition imposing a ‘cash lock-up’ on providers of Commissioner Requested Services in the event of financial distress; and
- a condition placing restrictions on licensees on lending and investment.
8.1 Purpose of the Continuity of Services licence conditions

The Act requires Monitor to establish a Continuity of Services framework. The purpose of this is to make sure that, in the event that there is a financial failure of a provider, services continue to be provided where necessary. For some services, patients could easily go elsewhere for treatment and so if a provider fails, patients would not be harmed. For certain services in some areas, however, a particular provider may be the only option available and then it becomes necessary to make sure that the services continue to be provided when a provider becomes financially unsustainable.

The Continuity of Services framework needs a more intricate set of licence conditions than for some of Monitor’s other functions, and so before we discuss each individual condition, we first provide an overview of the overall framework to put the licence conditions in context.

Designating services as Commissioner Requested Services (CRS)

The starting point for the Continuity of Services framework is the identification of those services that should continue to be provided in the event that an individual provider encounters financial difficulties. This will vary depending on the geographical location of the provider and the characteristics of the services it provides. In some cases – perhaps in densely populated urban areas – there may be a number of alternative providers of services near to each other, such that very few services would fall under the Continuity of Services framework. In other areas, however, there may be no other practical options for many services, and therefore there would be detrimental consequences if a provider stopped providing the service. It is in these cases that the framework is designed to apply.

In the licence, we call the services that will fall within the Continuity of Services framework Commissioner Requested Services (CRS). This is because we intend that it will be commissioners who decide which NHS services should be classified as CRS. Commissioners are best placed to assess which services they wish to designate as CRS, because whether a service can be replicated, or not, depends on the local picture of health care provision. Commissioners can propose to designate any service that is paid for using NHS money as CRS. We will soon publish a guidance document to help commissioners select which services they propose should be designated as CRS.

Designating a service as CRS places additional requirements on providers, not only because of the additional regulation that results, but also because it restricts changes that can be made to the service. There may be cases where providers and commissioners disagree about whether a service should be designated as CRS. Under the terms of the licence, a provider may “not unreasonably refuse” to have NHS services they provide designated as CRS. In cases where a commissioner believes that the provider’s refusal to continue to provide a service as a CRS service is unreasonable, under the licence Monitor may decide whether or not that is the case. If the provider disagrees with Monitor’s decision, it may appeal that decision as we describe in section 3.

As we explained in section 2, NHS foundation trusts will be the first providers to become licensed providers. When this happens, we propose that all services that are currently classified as ‘mandatory services’ under a foundation trust’s terms of authorisation will be automatically classified as CRS. But over time we expect that commissioners will choose to change which services they classify as CRS and to commission some CRS from providers who are not NHS
foundation trusts, that is, independent and third sector providers. We are considering a number of possibilities to encourage commissioners to change gradually the services classified as CRS. For example, as we discuss below, we are considering the case for providing some form of financial incentive for commissioners to designate services as CRS only where necessary. Also, we are seeking views on whether it may be appropriate to put in place provisions in the licence that limit the duration for which mandatory services are automatically classified as CRS (say, to the first three years), so as to encourage commissioners to review their approach to CRS designation within that time period.

When providers who are not NHS foundation trusts receive their licences, then a commissioner may request that some or all of their NHS services be designated CRS. As described above, the provider may not “unreasonably refuse” this request for designation.

We expect that, at the time of agreeing their NHS contract, providers will also agree with commissioners whether or not the services to be provided are to be designated as CRS and the commissioner and provider should agree appropriate terms to ensure Continuity of Services to patients when the contract comes to an end. For instance, a contract should have a notice period of sufficient duration and structure, to allow commissioners to source provision from alternative providers if the existing provider wishes to withdraw.

Paying for the Continuity of Services framework

The guarantee of continued provision comes at a cost. We expect that funding required to support the ongoing provision of services, in the event that a provider fails, will come from a central fund known as the risk pool. The intention is that all providers and commissioners will pay a pre-agreed amount into the risk pool each year. Risk pool funds will then be called upon in the event of the financial failure of a provider. In principle, the risk pool would operate like an insurance fund – individual providers pay into a central fund which would be used to protect against infrequent (but potentially high cost) events.

The obligation to pay into the risk pool does not happen automatically, so the licence conditions simply allow Monitor to oblige providers to pay into the risk pool if requested. Commissioner charges for the Risk Pool require secondary legislation and will be subject to a separate consultation by the Department of Health later in the year. In the meantime, the cost of protecting Continuity of Services when a provider fails will be funded by the Department of Health. We will consult later in the year on the methodology for determining how we may levy charges to collect the required funds for the risk pool.

Our intention is to design the levy on providers and on commissioners to reflect the underlying risks that they pose to the system. For example, it might be reasonable to have a higher levy on commissioners that have designated a higher volume of services as CRS, as they may be more likely to call on risk pool funds. Similarly, it might be reasonable to have a higher levy on those providers that are perceived to be more likely to enter financial distress, as they are more likely to impose a cost on the risk pool. One attraction of this approach is that it would create a financial incentive for commissioners to consider carefully which services are designated as CRS (and to take action where possible to reduce their reliance on single providers, which is also a benefit to patients) and for providers to take measures to reduce their risk of financial distress.

Assessing the risks to the continued provision of services
Where the Continuity of Services conditions apply, the Act places on Monitor a duty to make, on an ongoing basis, an assessment of the risks to the continued provision of CRS services. We intend to meet this duty by setting out a Risk Assessment Framework (RAF). We will be consulting on this RAF later in 2012, but so stakeholders can fully anticipate how the Continuity of Services conditions will operate in practice, we have set out a summary of how the RAF might look in Annex A. It is important to stress that at this stage we are not formally consulting on the RAF but we thought it helpful to set out now how we expect this to develop, so stakeholders can take it into account when they make their responses to the licence conditions.

The RAF will also be used in Monitor’s oversight role for NHS foundation trusts. The next section contains more details on the specific conditions we propose are imposed on NHS foundation trusts.

**When there is a risk to the continued provision of CRS**

Under the proposed licence conditions, Monitor may give notice to a provider of CRS stating that Monitor has concerns about its ability to carry on as a going concern. We will use the RAF to help us decide when to issue such a notice. Once Monitor issues this notice, the provider is obliged to do certain things, including to co-operate with people that Monitor may appoint in the management of the provider’s affairs.

We propose that this might include, for example, co-operating with a team of specialists who would work with local commissioners and providers to plan for the best way to make sure that, if things got worse, appropriate services would be protected. The Act expects commissioners to determine those services, and the first task of such a team would be to help them review the provider’s current designation of CRS and whether these properly represent those services that should be protected. This assessment will be helped by Monitor’s guidance regarding the designation of CRS, described earlier and which we will publish for consultation soon. These specialist teams will also help develop an agreed contingency plan for protecting these services if the provider were to fail, for instance, helping to identify options for restructuring health care provision so that protected services can be viably sustained. We do not rule out that this process might lead to a solution that can be agreed and implemented without the provider declining further into failure.

**Special Administration**

Monitor’s Continuity of Services duties are complemented by provisions in the Act and previous legislation, to appoint Special Administrators to operate in the case of providers becoming insolvent. In the case of NHS foundation trusts the pre-existing mechanism of Trust Special Administration (established under the National Health Service Act 2006), has been amended to apply in the context of the new regulatory regime. In the case of private providers, a new ‘Health Special Administration’ regime has been established by the 2012 Act.

Both systems envisage the appointment of a Special Administrator to take over the running of the failed provider, to ensure services identified by commissioners as protected services keep running (funded by the risk pool) and to work to find a longer-term solution for maintaining their provision. In carrying out these functions, the Special Administrator would be assisted by the earlier contingency planning, as described earlier.
Consulting on the Continuity of Services licence conditions

The Continuity of Services framework is critical to make sure that, if a provider fails financially, patients still have access to vital services. The nature of this framework means it necessarily comes at a cost - not only in funding the risk pool but also in imposing regulatory burdens on providers in the form of information and compliance requirements. Please give us your views on the framework that we have set out in the licence conditions, the soon to be published draft guidance on designating CRS, and in the summary of the RAF. We welcome your thoughts on how we can best meet our aim of making sure that enough protection is in place for patients while minimising the burden on providers.

8.2 Summary of each licence condition

General condition 10: Application of Section 5 (Continuity of Services)

As this condition determines to which providers the Continuity of Services conditions apply, it is classed as a General condition but we explain it with the other Continuity of Service conditions so the whole framework is considered together. General condition 10 specifies that licensees would only be subject to the other Continuity of Services licence conditions if they provide CRS.

As we set out above, the starting point of the Continuity of Services licence conditions is the identification of those services that would need to continue to be provided, even if the provider was to encounter financial distress or become insolvent. Because these identified services are considered so important, providers that supply them will be subject to the additional regulatory oversight set out in the Continuity of Services licence conditions. General condition 10 explains how we intend to identify the providers who are supplying these vital services and, in turn therefore, which providers will be subject to the Continuity of Services licence conditions.

When NHS foundation trusts are issued with licences, we propose that all services that are currently classified as mandatory services (under an NHS foundation trust’s current terms of authorisation) are designated as CRS. The exercise of identifying which services should be designated as CRS will take time and resource, and it is therefore not practical to expect commissioners to be able to undertake this analysis immediately. The use of mandatory services as a proxy for CRS in the early days of the new regime is therefore a pragmatic way of ensuring that vital services are protected from day one. Commissioners can immediately remove the CRS designation from any services they wish, provided they follow the correct procedure, but the default situation is that mandatory services become CRS.

Over time, commissioners may wish to designate services that were not mandatory services as CRS or to commission CRS from providers other than NHS foundation trusts. The licence is therefore drafted to allow commissioners to ‘opt-in’ other services to be CRS. We would anticipate that, most of the time, commissioners and providers would agree during their negotiations for a service whether it should be classified as CRS. However, the licence also allows for the possibility that a service that is already being provided be classified as CRS part way through a contract. In this case, the licensee may refuse to accept the commissioner’s designation of CRS, provided that the refusal is not unreasonable and is notified to Monitor in writing. If the commissioner believes that the licensees’ refusal is unreasonable then it may ask Monitor to determine whether this is the case.
We intend to publish soon draft guidance to commissioners which sets out our view on the factors commissioners should take into account when deciding which services to designate as CRS. This document also sets out the criteria and process Monitor proposes to use for judging whether or not a licensee's refusal to accept the designation of CRS is unreasonable.

If this process determines that the licensee’s refusal is not unreasonable, then Monitor will take no action against the provider to oblige it to accept the commissioner’s request and so the licensee will not be subject to any of the other Continuity of Services licence conditions (unless it provides other services that are CRS).

For the avoidance of doubt, it is important to note this condition does not oblige a licensee to start providing any services as CRS that it does not already provide. The wording of the condition is intended to protect against the eventuality that a licensee could avoid the provisions of the licence condition simply by ceasing to operate or divest the service in question. To do so would, in all likelihood, also be a breach of their contract with the commissioner, but the wording of the condition seeks to make sure that it is not possible to avoid the Continuity of Services licence conditions in this way.

**Options and variations that we are considering – General condition 10**

Given that mandatory services provided by NHS foundation trusts will automatically become CRS at the time of commencement of the licence, NHS foundation trusts will have a large number of services designated as CRS. We are considering whether it is necessary to make sure that, over time, these designations are reviewed. Options we are considering include:

- allowing CRS to reduce over time as contracts are renewed and commissioners review their CRS designations (particularly in light of financial incentives that the Act allows us to place on commissioners through the charging regime for the risk pool); or

- to put in place provisions in the licence that limit the duration of the designation of mandatory services as CRS, to encourage commissioners to review their CRS designation within a given time period. This time period could be, for example, three years from when NHS foundation trusts become licensed.

<table>
<thead>
<tr>
<th>Chapter 8 Q1: What do you consider to be an appropriate approach to CRS provision by NHS foundation trusts? Do you think we should allow CRS to reduce over time relying on commissioners to review the designations, or put in place provisions that limit the duration of CRS?</th>
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In the event that a provider of CRS does not wish to renew its contract to provide CRS, but the designating commissioner is unable to find another provider to supply the service at the time the contract expires, the Continuity of Services licence condition on the provider would continue to apply after the contract with the commissioner expires. In this situation, Monitor may need to oblige the provider to continue providing the service until a suitable alternative provider can be found.

Monitor cannot determine the way in which contractual terms between commissioners and providers are agreed. However, we believe that the best way to avoid the undesirable situation of a commissioner having insufficient time to find an alternative provider of the CRS services it
requires is for contracts for CRS services to be structured so as to guarantee continuity of patient care in the event that a provider did not wish to renew the contract. One example would be a rolling contract with a notice period of sufficient duration such that, if a provider wished to stop supplying the CRS service, the commissioner would have enough time to organise an alternative provider (or providers).

We recognise that, as Monitor’s licence condition potentially obliges a provider to carry on providing a service when it wishes to stop that provision, a degree of regulatory risk is created for providers. This may deter new provision by alternative providers and new investment in CRS. Monitor would therefore only expect to intervene where it is vital to secure the continued provision of services in the interests of patients, and would aim to minimise the impact of the intervention where possible. If this kind of regulatory intervention was necessary, Monitor would also seek to ensure that the commissioner paid an appropriate price for the service, reflecting the efficient cost of providing that service.

**Listening to stakeholders**

The earlier draft of this licence condition, published during our engagement with stakeholders, contained a clause stating that any commissioner who had designated a service as CRS in the last five years could object to its de-designation. After considering stakeholder feedback, we have removed this clause. Our view is that if a commissioner does not currently wish to designate a service as CRS, it cannot reasonably require that the designation is applied to services provided to another commissioner.

**Continuity of Services condition 1 — Continuing provision of Commissioner Requested Services**

Under this condition, licensees are not able to change the way in which they provide CRS without the agreement of commissioners and Monitor. Licensees would only be allowed to materially alter the provision of a CRS if:

- all commissioners who have designated the service as CRS agree to the removal of its CRS designation and/or to a change in the way it is provided; or

- the licensee is required or permitted to do so by the Care Quality Commission.

**Continuity of Services condition 2 — Restriction on the disposal of assets**

This licence condition would ensure that licensees keep an up-to-date register of all the relevant assets used in the provision of CRS and prevent licensees from disposing of, or relinquishing control over, any assets on that register without Monitor’s consent.

We consider that this condition provides important protection for CRS because:

- in the event that a licensee fails financially, this condition ensures that an incoming Special Administrator would still have the necessary assets and equipment at the provider to ensure continuity of patient care for CRS; and

- during the course of normal operations, it protects against the possibility that commissioners could be effectively forced to accept a reconfiguration of a CRS as a fait accompli following an asset disposal by a licensee.
Continuity of Services condition 2 therefore provides a safety net for exceptional circumstances where an asset disposal could pose a significant risk to the continued provision of CRS. However, we are keen to ensure that it does not create an undue regulatory burden on providers that might hamper innovation and discourage improvements in the way services are provided. We are therefore proposing a process that is, to a large extent, self-regulatory and risk-based.

We are continuing to review options for the detailed implementation of this proposal, including how to determine which assets should be included in the register and the basis for approval of disposals. This consultation process will help us to explore the practicalities of implementation further with licensees and other stakeholders. In Annexe Three we set out our current thinking on how this might work. At this time, this is for information - we will consult on our formal guidance on this topic later in the year.

**Listening to stakeholders**

After listening to stakeholders we have made two substantial adjustments to this condition. We have restricted the condition to land, buildings and other relevant assets, the disposal of which would put at risk the ability of the licensee to continue to provide CRS. We have also removed the condition that required licensees to give Monitor six months’ notice of any disposal. We recognise that these matters must be dealt with swiftly and efficiently and there is no reason for Monitor to require excessively long notice of a proposed disposal.

**Continuity of Services condition 3 – Monitor Risk Rating**

This condition requires licensees to at all times adopt and apply adequate standards of corporate governance and of financial management. If licensees are managing their finances well, they are more likely to be sustainable in the short and long term, and to be able to weather changes in their services or revenues. Therefore they are less likely to find themselves in financial difficulty and to put at risk the continuity of provision of CRS.

This condition has two important roles. It sets a benchmark for the financial performance of CRS providers that reduces the risk to Continuity of Services. It also provides us with an early warning system of impending financial difficulties.

To monitor compliance with this condition we intend to use our Risk Assessment Framework. We provide a high level summary of this framework in Annexe One.

**Listening to stakeholders**

In the earlier draft of this condition published as part of our stakeholder engagement on the licence, we proposed that the benchmark for financial performance would be an external credit rating of Investment Grade or a Monitor equivalent. Following research and feedback from stakeholders, we have concluded that this would be inappropriate at this time. Of course, we still require licensees to maintain adequate standards of financial management but by reference to Monitor’s rating system as summarised in Annexe One.

The previous draft also suggested that, where a Monitor rating was obtained instead of an external credit rating, a specific fee would be paid to Monitor. This was to ensure that the approach was fair and even-handed across licensees. The new risk rating condition does not raise these concerns and so we do not intend to proceed with this proposal for a separate fee.
Continuity of Services condition 4 – Undertaking from the ultimate controller

This condition requires licensees to put in place a legally enforceable agreement with their ‘ultimate controller’.

An ultimate controller undertaking is a regulatory instrument to prevent parent companies from taking actions that would cause a licensee to breach its licence. Similar licence conditions operate in the regulated parts of the gas, electricity, rail and water sectors.

An ultimate controller is any body that could instruct the licensee to carry out particular actions. In practice, the ultimate controller would usually be the parent company of a subsidiary company, where it is the subsidiary company that has been licensed by Monitor. The agreement between the licensee and the ultimate controller would require the ultimate controller to refrain from taking any action that would cause licensees to breach our licence conditions.

If there is no single body that can instruct the licensee in this way, then the licensee does not have an ultimate controller, in which case there is no need for an undertaking under this condition.

If a licensee is taken over by, or otherwise becomes subject to, a new ultimate controller, it will have seven days to put a new agreement in place. Agreements are required to remain in place for as long as the relationship between the two parties exists.

The licence conditions we are proposing would require ultimate controllers to provide information about themselves, or other related parties, which licensees may need in order to comply with our licence conditions.

This licence condition protects against the risk that outside influences, notably parent companies that are not licensed by us, take action that prevents licensees from complying with our licence conditions. For example, a parent company would not be able to restructure the licensee or sell licensee assets in a way that would prejudice the ability of the licensee to deliver its CRS. The undertaking given by an ultimate controller under this licence condition is therefore another element of the ring-fence around CRS designed to protect patients.

Continuity of Services condition 5 – Risk pool levy

As we discussed at the beginning of the chapter, in the event of a provider entering special administration, the cost of continuing to provide the services that are considered vital to patients will be met by a central fund known as the risk pool. This licence condition requires licensees to contribute towards the funding of this pool. Licensees would be required to make their contributions within 28 days of our request.

We are currently considering whether it is appropriate that the levy charged on providers of CRS be risk-adjusted, so that the riskiest providers would make the largest relative contributions. The benefit of this approach would be that it provides a financial incentive for licensees to manage themselves in a financially sustainable way and ensures that licensees contribute towards the costs of dealing with financial failure in proportion to the risk that they place on the system.

Subject to secondary legislation, we are examining the case for also levying risk pool charges on commissioners, based on the volume of CRS services they procure. This would provide a financial incentive to commissioners to designate services as CRS only where necessary.
The risk pool will not come into effect until April 2014. We will undertake a separate consultation in 2013 on the details of how the risk pool will be managed and how the levy (and potential commissioner charges) will be calculated. The Department of Health will also be consulting on regulations around the risk pool later in 2012 and specifically on what happens if relevant providers object to the way Monitor plans to calculate levies, and on levying charges on commissioners.

**Continuity of Services condition 6 – Cooperation in the event of financial stress**

This licence condition applies when a licensee fails to meet the test of sound financial management as set out in Continuity of Services condition 3 and as monitored under Monitor's Risk Assessment Framework.

If this happens, licensees could be required to:

- provide information to commissioners;
- allow parties appointed by Monitor to enter their premises; and
- actively cooperate with such parties.

More detail about the triggers that may lead to specific interventions will be set out in our detailed consultation on the Risk Assessment Framework which will be published later in 2012.

The requirement to allow parties appointed by Monitor to enter premises will only be invoked when a licensee reaches the “distress” stage of our Risk Assessment Framework. Allowing entry to third parties appointed by Monitor would allow Monitor-appointed specialist teams to work with commissioners to identify which services would become protected services if the licensee were to become insolvent. This information would be passed on to the special administrator, who would be responsible for formally identifying protected services, in consultation with wider stakeholders.

**Listening to stakeholders**

The only change to this condition since the earlier stakeholder engagement is to the definition of the circumstances under which this condition is triggered. This change is simply to bring this condition into line with the changes that have been made to Continuity of Services condition 3 on risk ratings.

**Continuity of Services condition 7 – Availability of resources**

This condition requires licensees to act in a way that secures access to the resources needed to operate CRS (the ‘required resources’). These resources include management resources; financial resources and facilities; personnel; physical and other assets; and working capital.

Each year, licensees would be required to provide us with a certificate, signed by their boards, stating that over the course of the next 12 months, they either:

- reasonably expect to have the required resources to keep their CRS running; or
- reasonably expect to have the required resources to keep their CRS running, but they would like to draw our attention explicitly to specific risk factors; or
• will not have the required resources to keep their CRS running, in their opinion.

Licensees would also have to send us a statement of the main factors that they have taken into account in preparing the certificate, together with a working capital statement.

This condition provides us with reassurance that the board of a provider has duly considered that the provider will have sufficient resources dedicated to the provision of CRS over the next 12 months.

A further requirement of this condition is that licensees would have to inform us immediately if they become aware of any circumstances that cause them to believe that their most recent certificate is no longer valid.

Listening to stakeholders

Following stakeholder engagement we have made some significant changes to this condition:

• we have removed the requirement for the licensee to provide a report from its auditor in support of its statement of resources. We consider that this requirement would place an unnecessary regulatory burden on licensees.

• licensees will be allowed to submit statements in line with their own financial year end, rather than having to comply with Monitor’s financial year. This should simplify licensees’ financial planning processes and therefore reduce the regulatory burden of this condition.

• the restriction on the ability of licensees to pay dividends has been removed. Following stakeholder feedback, we now believe that this requirement is excessive, especially in the case of licensees for whom CRS may form only a small part of their overall business. We believe that we can use our enforcement powers to address the situation where continuity of provision of a CRS is threatened by payments, including dividends, from a licensee to a parent company.

8.3 Proposal to remove conditions

In our earlier stakeholder engagement, we included three additional licence conditions which we now propose to remove. These are:

• Indebtedness. Research carried out for Monitor has concluded that regulatory restrictions on indebtedness are only appropriate in very specific conditions, in particular where there may be a lack of effective spending control and debts may be subject to an implicit government guarantee. We have concluded therefore that a general Continuity of Services condition on indebtedness, applying to all licensees, is not appropriate.

Continuity of service is in any event protected from excessive indebtedness by our other licence conditions, including Continuity of Services condition 3, under which licensees will be rated on their financial strength, and Continuity of Services condition 7, under which licensees must declare that they have sufficient financial resources to continue to provide CRS.
• **Further restrictions in the event of financial distress.** This condition imposed a ‘cash lock-up’ on providers of CRS in the event of financial distress. Our view is that a blanket restriction of this kind would be disproportionate, especially for licensees where CRS makes up only a small proportion of their total business. However, we believe that there are very specific circumstances - when a licensee is financially sound, but its parent company is in financial difficulty - where a form of cash lock-up or some other financial guarantee may be an appropriate action for us to take in order to ensure continuity of provision of CRS. We have therefore removed the general licence condition requiring a cash lock-up but envisage that Monitor will be able to seek appropriate and proportionate financial assurances from a parent company in the event of financial distress by enforcement order or undertakings associated with Continuity of Services condition 3.

• **Restrictions on lending and investment.** This condition placed restrictions on licensees in terms of lending. The feedback from the stakeholder engagement has persuaded us that this restriction is not needed as a Continuity of Services condition. It is inappropriate for us to police the lending decisions of private institutions, which are subject to normal corporate governance oversight. In the event that these decisions lead the licensee into financial difficulties, our Risk Assessment Framework and Continuity of Services condition 3 should provide sufficient warning of any threat to continuity of service. This issue could also be addressed through Monitor’s separate powers relating to NHS foundation trust governance, given that poor lending decisions may be indicative of poor financial governance within a foundation trust.
There have been changes since stakeholder engagement earlier in the year. During the final stages of the Bill’s passage through Parliament, Monitor’s oversight role in relation to overseeing NHS foundation trusts changed so that Monitor can continue to regulate foundation trusts to ensure they remain well-governed. Monitor can now set licence conditions specific to NHS foundation trusts so long as those conditions relate to governance.

The overall licence will replace NHS foundation trusts’ existing terms of authorisation, which will cease to apply.

**The proposed foundation trust-specific conditions for consultation are:**

**NHS foundation trust condition 1: Information to update the register of NHS Foundation Trusts**

This licence condition ensures that NHS foundation trusts provide required documentation to Monitor.

**NHS foundation trust condition 2: Payment to Monitor in respect of registration and related costs**

If Monitor moves to funding by collecting fees, we may need this licence condition to charge additional fees to NHS foundation trusts to recover the costs of registration.

**NHS foundation trust condition 3: Provision of information to advisory panel**

The Act gives Monitor the ability to establish an advisory panel that will consider questions brought by governors. It is Monitor’s current intention to establish this panel. This licence condition requires NHS foundation trusts to provide the information requested by an advisory panel.

**NHS foundation trust condition 4: NHS Foundation Trust governance arrangements**

This licence condition enables Monitor to continue oversight of the governance of NHS foundation trusts.

During the stakeholder engagement earlier in the year, we consulted on three licence conditions that could have been inserted into the licence of an NHS foundation trust that Monitor considered at risk of breaching its ‘principal purpose’. These licence conditions are now no longer relevant.
9.1 Purpose of the NHS foundation trust licence conditions

During our earlier stakeholder engagement, we explained that some additional requirements would apply to NHS foundation trusts in relation to governance.

During its passage through Parliament, the Health and Social Care Bill was amended considerably. One such amendment at a late stage in the process changed Monitor’s mechanism to oversee the governance of NHS foundation trusts. Before amendment, the Bill proposed that, separate from the licence conditions, there should be consideration by Monitor of the risk of an NHS foundation trust failing to fulfil its principal purpose, as defined. Where Monitor was satisfied a significant risk did exist, Monitor could insert additional conditions into the licence to address the risk. This section was transitional in nature.

This provision in the Bill concerning risk to principal purpose was not carried through, however, into the Act. On a permanent rather than transitional basis, the Act allows Monitor to vary the standard conditions applicable to different types of licence holder, but only where the variation relates to the governance of the licence holder and is necessary to take account of the differences in status of different licensees or where it is necessary to ensure that burdens different licence have are broadly consistent. Ministers made clear the Government’s intention for Monitor to continue to oversee and regulate the governance of NHS foundation trusts in a similar way as it does today, taking account of the unique governance structure of NHS foundation trusts, and the time it may take for governors to develop the capability to hold their boards of directors to account.

In addition to setting different or additional conditions, where Monitor is satisfied that the governance of an NHS foundation trust is such that the trust will fail to comply with the conditions of its licence Monitor may include additional conditions into the licence, relating to governance, as it considers appropriate to reduce that risk. If Monitor is satisfied that these additional conditions have been breached, it may take steps requiring specific actions take place, including the removal, suspension or disqualification of directors or governors. This provision will remain in place until at least April 2016.

Therefore, to re-cap, Monitor can, as a result, oversee NHS foundation trusts in two ways:

i. through setting a permanent condition for NHS foundation trusts reflecting our governance requirements, and monitoring compliance with this condition; and

ii. for a transitional period and when required, by placing a new governance-related condition in the licence of an NHS foundation trust to reduce the risk of it failing to comply with its licence conditions as a result of its governance inadequacies.

The NHS foundation trust governance conditions

Monitor intends to set additional, standard conditions for NHS foundation trusts relating to governance, to reflect their substantively different governance arrangements, the importance of their position in the provision of NHS health care services, and Parliament’s expectation that Monitor should continue to oversee the governance of NHS foundation trusts.

We describe these governance licence conditions in the next section.
Section 8.1 explained our proposal that all mandatory services currently provided by NHS foundation trusts will be initially designated as CRS. Over time, we expect commissioners to review their CRS and remove designation from some services provided by NHS foundation trusts, and equally, designate some services provided by other providers. Where an NHS foundation trust is supplying CRS, it will be subject to both the Continuity of Services licence conditions and the specific NHS foundation trust conditions. Were it to cease supplying CRS, it would be subject only to the NHS foundation trust conditions.

The NHS foundation trust licence conditions are in Annexe Two.

9.2 Who do these licence conditions apply to?

We propose that the NHS foundation trust licence conditions will apply to NHS foundation trusts only.

9.3 Summary of each licence condition

NHS foundation trust condition 1 – Information to update the register of NHS Foundation Trusts

Under the National Health Service Act 2006, Monitor must maintain a register of NHS foundation trusts. This is similar, for example, to the register of limited companies kept by Companies House. The information required to be on the register includes NHS foundation trust constitutions, and annual reports and accounts.

This licence condition ensures that foundation trusts provide versions of the required documents to Monitor. In practice, this will mean having to provide the document, for example an annual report, to Monitor within 28 days of receipt of the original.

NHS foundation trust condition 2 – Payment to Monitor in respect of registration and related costs

In the General licence conditions, we have included a draft licence condition about Monitor’s ability to charge fees. As explained earlier, no decisions have been taken as to whether or not we will charge fees. That licence condition creates the ability for fees to be charged and should this become our funding route we plan to hold a separate consultation on our approach in this area.

In this chapter on NHS foundation trusts, we have included a separate licence condition on fees. This is because some of our costs would be incurred only in relation to NHS foundation trusts (e.g. costs of maintaining the register). If fees were to become our funding model, it may be appropriate to charge additional fees to NHS foundation trusts to recover such costs.

NHS foundation trust condition 3 – Provision of information to advisory panel

The Act gives Monitor the ability to establish an advisory panel to consider questions brought by governors. It is our current intention to establish this panel.

The panel would provide a source of independent advice to governors, and would help governors fulfil their role of holding non-executive directors to account for the performance of the board. Subject to further secondary legislation, the panel’s scope would be limited to advising on whether an NHS foundation trust has failed or is failing to act in accordance with its constitution and other requirements of Part 4 of the Act.
As part of its investigation, the panel could request information or advice. This licence condition would require NHS foundation trusts to provide the information requested, such that the panel is able to give the best advice possible.

**NHS foundation trust condition 4 – NHS Foundation Trust governance arrangements**

This licence condition will enable us to continue our current role in relation to NHS foundation trust governance.

The licence condition sets out our expectations regarding the governance of NHS foundation trusts. For example, it requires NHS foundation trusts to have effective board and committee structures, reporting lines and performance and risk management systems. Many of the requirements in this licence condition are similar to the statements NHS foundation trust boards currently make as part of the annual or quarterly submissions and are consistent with our approach to date in assessing governance at NHS foundation trusts.

It is not the role of this licence condition to define what such governance systems and processes should look like in detail. We are keen that NHS foundation trusts should have the autonomy and flexibility to ensure their structures and processes work well for their organisations now and into the future, while ensuring they meet our overall requirements.

The Risk Assessment Framework will set out Monitor’s approach to the assessment of risk to comply with this condition. We plan to consult on this guidance later this year. A summary is now available in Annexe One.

**Chapter 9 Q1**: Do you believe the licence condition captures all relevant areas of governance for foundation trusts? Is anything included that should not be? Is anything missing that should be included?

**Options we are considering**

In relation to the governance of NHS foundation trusts, we are considering whether it may be appropriate for Monitor to carry out regular reviews of the governance arrangements of each NHS foundation trust.

**Chapter 9 Q2**: Do you believe it would be appropriate for Monitor to carry out regular reviews of the governance arrangements of each NHS foundation trust?

**Conditions we intend to remove**

In our stakeholder engagement, we included three licence conditions which we now intend to remove. These were referred to as “NHS foundation trust transitional licence conditions”, and were the conditions which would have been inserted into the licences of NHS foundation trusts if they were at risk of breaching their ‘principal purpose’. As explained earlier, due to the changes in the Bill before it become an Act, these licence conditions are now no longer relevant, and we have not included them in this consultation.
9.4 Listening to stakeholders

From the responses we received during stakeholder engagement earlier in the year, we identified three key themes about the NHS foundation trust conditions. These are summarised below, with an explanation about how these concerns have now been addressed.

Turnaround plan assurers

Some respondents felt we should broaden, and be more specific about, the types of professionals that could act as turnaround plan assurers. As this theme referred to the ‘NHS foundation trust transitional’ licence conditions, which have been removed from the consultation due to late changes in the legislation, no resulting changes have been made.

However, in principle we agree that it should not always be necessary for assurance reports on turnaround plans to be provided by someone qualified to act as an auditor to NHS foundation trusts. We recognise the importance of other sources of assurance, such as peer review, and are keen to explore how they can be used more often. This approach was already reflected in our draft licence conditions, which stated that an assurance report could also be provided by someone we approve in writing.

Differing opinions of the need for, and specific role of, the governor panel

Stakeholders had differing views on the need for the governor panel and there was also some uncertainty about its specific role. Approximately half of respondents were in favour of having this panel, and half were opposed. We have decided to propose to create this panel, but intend to draft the terms of reference to make it clear that the panel will only give independent advice on whether the trust is breaching the terms of the constitution, or the other requirements of Part 4 of the Act.

The need for fees for our function as NHS foundation trust registrar and how fees will be assessed

Some respondents wanted to know why we might charge fees for our NHS foundation trust registrar function and how fees will be assessed. We expect the costs and fees associated with our NHS foundation trust registrar role to be small. The registrar role only requires us to collect, store and make available certain information about NHS foundation trusts. We will aim to make sure that any administrative costs associated with the collection of fees are as low as possible. Monitor may also charge fees for its overall regulatory activities but as these will ultimately cover other organisations as well, we have chosen to keep the foundation trust registrar fee separate.
List of consultation questions

As set out in the text, we have developed some specific questions in areas where we are still considering options. Please see below.

**Chapter 3 Q1:** Do you think Monitor should include the option to retain the discretion to issue a licence or to allow a provider to continue to hold a licence where, in exceptional circumstances and at Monitor’s discretion, a director or governor (or equivalent person) fails the fit and proper persons test?

**Chapter 3 Q2:** Do you think Monitor should include in the fit and proper person test a requirement that directors and governors (or equivalent people) adhere to relevant standards of personal behaviours, technical competence and business practices?

If so, do you think such a requirement should apply to all licensees? What standards should Monitor use as a reference? Or should Monitor set out the relevant standards in guidance to the licence condition?

**Chapter 3 Q3:** Do you support the proposed changes to limit the fit and proper persons test to directors and governors or those performing equivalent or similar functions?

**Chapter 4 Q1:** Which of the three options for General licence condition 6 do you think will bring about the best outcome? In answering this question, please note the interaction with Monitor’s proposal not to include a General licence condition requiring compliance with other legal obligations.

**Chapter 4 Q2:** Do you think Monitor should include a licence condition requiring licensees to carry out their activities effectively, efficiently and economically?

**Chapter 4 Q3:** Do you think Monitor should include in the final licence:

a) A condition requiring licensees to assist with emergency planning and responses to emergencies? b) A condition which obliges compliance with statutory and other requirements?

In answering question b), please note the interaction with Monitor’s proposal for general condition 6.

**Chapter 6 Q1:** Do you think Monitor should include in the choice licence condition a requirement that, where the provider responsible for giving advice is itself a provider of some services the patient could choose, then the licensee must make arrangements to ensure that the patient is offered impartial advice about the choices that are available? Please set out how you see the costs and benefits of this option.

**Chapter 6 Q2:** Do you think a licence condition that requires NHS foundation trusts to notify the Office of Fair Trading of mergers with other businesses that provide health care services before they are completed is necessary and has benefits?

**Chapter 7 Q1:** Which of the three options for the Integrated Care licence condition do you think will bring about the best outcome?

**Chapter 7 Q2:** Do you think the Integrated Care condition should include a patient interest test?
**Chapter 8 Q1:** What do you consider to be an appropriate approach to CRS provision by NHS foundation trusts? Do you think we should allow CRS to reduce over time relying on commissioners to review the designations, or put in place provisions that limit the duration of CRS?

**Chapter 9 Q1:** Do you believe the licence condition captures all relevant areas of governance for foundation trusts? Is anything included that should not be? Is anything missing that should be included?

**Chapter 9 Q2:** Do you believe it would be appropriate for Monitor to carry out regular reviews of the governance arrangements of each NHS foundation trust?
Annexe One: Monitor’s Risk Assessment Framework

This annexe sets out, in high-level summary form, Monitor’s proposed Risk Assessment Framework (RAF) for providers of Commissioner Requested Services (CRS).

At this stage, this annexe is for information only. We will be publishing and formally consulting on the full RAF later this year. This summary is being provided now so that stakeholders may understand in broad terms how we propose that the Continuity of Services licence conditions and the NHS foundation trust licence conditions may operate in practice.

As we explained earlier, the Risk Assessment Framework we are developing will help Monitor undertake two discrete, but related, activities.

First, the framework will allow us to monitor the financial strength of providers of CRS. This should give Monitor advance warning that a provider is about to encounter financial difficulties that could threaten the continued provision of vital services, and enable us to take action where necessary. This monitoring aspect of the framework will cover all providers of CRS, which may over time include independent sector and charitable providers, in addition to NHS foundation trusts.

Second, as explained in Chapter 9, we are proposing that some additional requirements apply to NHS foundation trusts in relation to governance, and the Risk Assessment Framework will form part of our oversight of the governance of NHS foundation trusts.

This annexe summarises our thinking to date on how the proposed Risk Assessment Framework will assist us to perform our functions in these areas in a way that is reasonable, proportionate, evidence-based and, as may be appropriate, consistent. Reflecting the two tasks outlined above, our discussion of the framework is divided into two sections:

- first, we discuss how we will use the RAF to ensure continuity of provision of vital services; and
- second, we consider how we will use the RAF to oversee the governance of NHS foundation trusts.

A.1 Continuity of Services

Monitor’s Continuity of Services framework will seek to ensure that vital health care services continue to be provided in the event that a provider encounters financial difficulties. A key element of this will be monitoring the financial situation of CRS providers, so that Monitor becomes aware on a timely basis when a provider is likely to have problems. This advance warning will give Monitor sufficient time to intervene as appropriate. The nature of Monitor’s intervention will depend on the particular circumstances of the case.

We propose that the Risk Assessment Framework will combine a range of different metrics to build up as full an understanding as possible of a provider’s circumstances. In developing our framework we are looking to draw on both quantitative and qualitative data. Financial metrics will
form the core of the framework but, as they do not always reveal the whole picture, we are examining the scope to overlay financial metrics with an assessment of other factors, such as clinical performance and governance, where these factors may act as a significant indicator of approaching financial difficulties. This is in line with the approach to risk assessment taken by credit ratings agencies, banks and other investors.

The new Risk Assessment Framework will apply to all CRS providers, not just NHS foundation trusts. For some licensees, CRS services will comprise the bulk of their activities. For others, CRS may only be a small proportion of their overall operation. We will undertake risk assessment at the level of the licence holder, regardless of the volume of CRS provided. Our rationale for this is that because financial difficulties being experienced by an organisation providing CRS pose a risk to CRS, regardless of where in the business these difficulties arise.

Many of the elements of our new framework will be familiar to those already subject to Monitor’s Compliance Framework and the Financial Risk Rating (FRR) and Governance Risk Rating (GRR) measures it contains. The new metrics will also be familiar to private providers, investors and lenders, as they are based on standard benchmarks and approaches used in financial risk analysis.

However, there are material differences between Monitor’s existing Financial Risk Rating and the new Risk Assessment Framework in relation to some of the specific financial metrics and weightings, the inclusion of a forward-looking risk element and mechanisms for applying an “override” to the outcome of the rating. In the remainder of this section, we:

- set out at a high level the types of financial metrics we will use in the framework, and how we will combine these to assess the level of risk posed to the provision of CRS by a particular provider;
- describe our intended use of overrides;
- explain how different categories of risk may trigger certain actions by Monitor; and
- provide our initial views on reporting requirements for providers under the RAF.

### A.2 Core financial metrics

The starting point of our Risk Assessment Framework is a set of financial metrics that, if taken together, should reflect the underlying financial strength of a provider. We intend to use these metrics to derive an overall risk assessment score. In this section, we provide an outline of:

- our views on the financial metrics that we should use in our risk assessment;
- our intended use of forward-looking metrics to inform the risk assessment;
- how we could weight each particular metric in defining a risk score; and
- our approach to calibrating risk to derive an overall risk assessment.

**Financial metrics**

Our proposed basket of financial metrics is based on detailed research, modelling and stakeholder engagement. This work is ongoing and we will explain it in our consultation later this year. We set out below the financial metrics we intend to use, and note where this metric is not used in the existing FRR regime for NHS foundation trusts.
Indicators of **operational efficiency** measure a provider’s ability to generate the cash required to run the operations and pay creditors, staff and suppliers. Metrics currently included in the FRR that we are likely to retain include:

- EBITDA margin – measures cash generation by the operations of the business, before accounting for debt or non-operating costs;
- Income surplus margin – measures profitability after non-operating expenses; and
- Return on Capital Employed (%) – measures ability to support ongoing investment in the business.

Indicators of the **efficiency of financial management** measure how well a provider manages its cash flow and short-term liquidity, and the sustainability of its long-term debt and other contractual liabilities. This is fundamental to a provider being able to continue paying the bills and to keep services running, in the short and longer term. As well as using the existing FRR approach, which includes a liquidity measure, we are considering incorporating a measure of the risk posed by a provider’s level of indebtedness. There are a number of ways of doing this and our view is that a cash-based measure, rather than an asset-based measure, would be more appropriate to the NHS. Therefore, our expectation is that we will use:

- Liquidity days - measures roughly the number of days of operating expenses which can be met from cash and other liquid assets; and
- Interest cover – indicator of the provider’s ability to service debt. This would be a new metric relative to the current FRR approach.

**Forward-looking metrics**

As well as measures of current financial performance, we are also exploring how to introduce an effective forward-looking element into our risk assessment. As with all other elements of the framework, this must be something that is applicable to all CRS providers, whether or not they are NHS foundation trusts.

One option would be, as well as reviewing current data from providers on the proposed basket of metrics (e.g. quarterly returns), we could also review data on those metrics on a forward-looking, planned basis. We think this would be practicable, as the necessary data are likely to be produced routinely by all providers, including providers other than NHS foundation trusts, in the preparation of annual plans.

However, there could be difficulties with such an approach, for instance, in some cases providers might present over-optimistic projections, in order to obtain a more favourable overall rating. This suggests that any use for forecast financial data in our ratings should be paired with an adequate level of oversight to ensure that the projections are reasonable, and some form of penalty (perhaps in the form of a reduction in the final risk rating) for projections that are considered not to have been reasonable, for example in the event of repeated failure to achieve projected targets. We are currently exploring how these proposals might work and will consult in more detail later this year.

**Weights**

In constructing our proposed composite financial risk rating from the basket of indicators outlined above, we will need to weight the different components. Our current view is that those weights will need to differ from those used in the current FRR, because new metrics will be included.
following our further thinking about how the risk of failure may be predicted. For instance, stakeholder feedback and modelling suggests that the return on capital employed (ROCE) metric may be less useful in predicting financial difficulties than other indicators.

Details of the weights we propose to use will be included in our consultation later this year.

**Calibration**

After identifying the metrics and the weights, the next step is to create a risk scale and to identify what level of each indicator would be expected at each point on the scale. This process is termed ‘calibration’.

We are proposing to designate different categories of risk at different positions along the risk scale. The rating categories we are proposing are: 'Normal', 'Concern', 'Distress' and ‘Financial failure’.

The table below is illustrative of how a rating scale may be built up from our proposed quantitative financial metrics. The weightings presented are indicative, as is the number of ‘notches’ on the scale (currently 10).

NHS foundation trusts should be assured that our expectation is that the initial ratings on our new scale do not diverge materially for individual trusts from their current risk assessment under the existing FRR framework.

**Figure A.1 Summary of Quantitative Financial Metrics**

<table>
<thead>
<tr>
<th>Benchmark for all Provider Types</th>
<th>Pass mark for each category (moving from left to right)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area</td>
<td>Failure Distress Concern Normal</td>
</tr>
<tr>
<td>Cash</td>
<td></td>
</tr>
<tr>
<td>Creditor Days</td>
<td>15.0%</td>
</tr>
<tr>
<td>Liquidity days</td>
<td>15.0%</td>
</tr>
<tr>
<td>Interest Cover Ratio</td>
<td>15.0%</td>
</tr>
<tr>
<td>Underlying Performance</td>
<td></td>
</tr>
<tr>
<td>EBITDA % margin</td>
<td>20.0%</td>
</tr>
<tr>
<td>Income surplus % margin</td>
<td>20.0%</td>
</tr>
<tr>
<td>Return on Capital Employed</td>
<td>5.0%</td>
</tr>
<tr>
<td>Shocks</td>
<td></td>
</tr>
<tr>
<td>Total Operating Revenue G00 % change</td>
<td>10.0%</td>
</tr>
</tbody>
</table>

**A.3 Qualitative overrides**

While the starting point for the new framework is a set of core financial metrics, there is a risk that these indicators may not capture other important factors and therefore over or understate the financial position of a provider. The process of risk assessment should also therefore include an element of informed judgement. We envisage that an initial rating, calculated on the basis of the core financial metrics set out above, may be subject to a number of potential ‘overrides’ to take into account more qualitative factors, such as a wider financial/market assessment and clinical and governance issues. The Monitor team will take a robust, transparent and evidence-based approach to these judgements.
We would emphasise our current thinking that qualitative consideration of wider factors is not likely to lead to an override of the provider’s initial rating in the majority of cases. In the remainder of this sub section we describe our current thinking on:

- possible financial overrides;
- possible overrides related to clinical or governance issues; and
- how we might apply the overrides to ensure consistency and transparency.

**Financial overrides**

We are reviewing a range of possible financial factors that might lead Monitor to apply an override. As part of our review of these factors, we are considering measurement issues and practicality, as well as the potential usefulness of such overrides. We recognise that our approach must be reasonable, proportionate, evidence-based and, as may be appropriate, consistent. The factors under review are set out below:

- **External Credit Rating** – this could be taken into account as a separate, independent perspective on a provider’s risk, might increase Monitor’s confidence in a provider’s financial situation and so result in an improved risk rating.
- **Reliance on block contracts** – this could reduce or increase a provider’s financial security, depending on the importance of those contracts and when the contracts are due for renewal.
- **Number of PCTs or Clinical Commissioning Groups (CCGs) on which the provider relies** – this could influence the level of revenue risk.
- **Asset lives and replacement schedules for material assets** – these might be useful indicators of future investment requirements.
- **Significant levels of indebtedness & Private Finance Initiative (PFI)** – the Department of Health has recommended that PFI payments should not exceed 10% of income.\(^1\) A higher percentage may expose the provider to greater risk.
- **Proposed transactions** – if the provider is considering any large future transactions, this might affect future financial indicators. We might therefore wish to be informed of any material changes to a provider’s forward plan, including proposed transactions that might impact on risk to Continuity of Services. In doing so, we would ensure a proportionate approach, reflecting amongst other things, the significance of CRS provision to the provider’s overall operations, and the relevance of the transaction to that activity.
- **Changes in local demographics** – these may have significant impact on future revenue streams or cost drivers.

**Clinical and Governance overrides**

\(^1\) Monitor’s 2009 under [Tier 2 Cap Ratio Test](#). The limit is 10% which applies to all PFI and other interest payments (Maximum Annual Debt Service) as a percentage of annual revenue.

\(^2\) The Annual Governance Statement was formerly known as the Statement on Internal Control.
We consider that certain clinical or governance ‘events’ could also signal an increased likelihood of future financial difficulties. As such, it would be appropriate to consider these in coming to a final risk rating for any provider.

The factors we propose to consider are unlikely to be the same as those in the current GRR, because the ‘events’ must be specifically related to likely financial consequences in the short to medium term. It is not Monitor’s role to set clinical standards, and we propose to have separate governance licence conditions for NHS foundation trusts. Clinical and governance factors will therefore be considered within the Risk Assessment Framework because they are used as leading indicators of financial difficulties.

We have considered whether it would be feasible to include such factors in the risk framework directly, by allocating each factor a score and a weight. Our view is that this would be inappropriate, because it could lead providers to make inappropriate trade-offs between different factors. All providers are required to comply with all relevant clinical standards determined by the CQC and to maintain appropriate standards of financial management. It is not acceptable to suggest that financial and clinical standards could be traded off one against the other. Further, we consider that the clinical and governance ‘events’ that might impact on financial performance are so varied and circumstance-specific that it would be impossible to assign generic weights to any category of event.

For these reasons, our view is that clinical and governance overrides, insofar as they enter into our Risk Assessment Framework, must be used on a case-by-case basis, by applying professional judgement and experience to assess their relevance to the specific case. An override of the initial risk rating would generally occur in the event that Monitor was satisfied that the event in question presented a material risk of a worsening financial situation in the short to medium term.

Monitor is considering the use of a number of possible clinical and governance ‘events’ that might lead us to apply an override. We propose that the clinical override be based on CQC Warning Notices against a licensee, for any of the outcomes that CQC assesses. We are currently considering appropriate governance indicators that might be applicable to all licensees and will consult on these in due course.

Applying overrides

As discussed above, Monitor proposes to set out a list of financial, clinical and governance ‘events’ that could lead to an override of a licensee’s initial rating. When one or more of these events occurs, Monitor would make a decision about whether or not to apply an override. It is important to note that the occurrence of one or more of the events on the list would not automatically lead to an override being applied; it will be a matter of judgement.

In deciding whether to apply an override, Monitor will consider a number of factors, including whether:

(i) the impact of the issue driving the override is already captured by the metrics in the ‘calculated’ risk rating, to avoid double counting;

(ii) the evidence is robust; and

(iii) the event represents a clear and tangible risk to its financial sustainability.
In making this assessment, Monitor will gather any necessary supplementary evidence, including as appropriate from the licensee, bearing in mind that our approach must be reasonable, proportionate, evidence-based and, as may be appropriate, consistent.

Monitor is likely to give consideration to whether, as a consequence of the event or in order to rectify it, it is likely that the licensee’s costs will rise significantly, or its revenues fall, in such a way that the licensee’s risk rating, based on the objective financial metrics, will deteriorate by at least one point on the rating scale in the next three months.

Any recommendation to adjust the risk rating would be subject to an internal scrutiny process.

Licensees should note that under the legislation, the main trigger for special administration is that the provider is, or is likely to become, unable to pay its debts. Any overrides by Monitor cannot in themselves move a licensee from ‘Distress’ into ‘Financial failure’.

**Example of application of a qualitative override**

A licensee receives a notice of **Major Concern** from CQC relating to the output requirement for it to maintain adequate levels of staffing. Monitor will consider what costs the licensee is likely to incur to rectify this situation and what the likely impact would be on the organisation’s risk rating, taking into account as appropriate input from the licensee. If the impact would be large enough to move the licensee down at least one point on the scale, Monitor will consider an override of the licensee’s rating.

Monitor will also need to consider the nature and extent of the scope of the override process. Our current thinking is that overrides would only be able to move a provider’s risk rating plus or minus one point on the scale, other than in exceptional circumstances where the evidence indicates a high likelihood of a rapid and drastic deterioration in the licensee’s future financial position. The basis for this view is as follows:

- Routine and/or extensive overrides of the initial rating could undermine the credibility of the system. It is important that licensees can assess for themselves approximately where they are on the scale.
- The risk rating will be re-calculated quarterly (at least for providers with ratings in or close to ‘Concern’), so there will be an opportunity to revisit the rating based on actual financial performance in three months.
- The calibration of the risk rating scale is such that movements of more than one notch on the scale from one quarter to the next should be very unusual.

**A.4 Actions associated with different categories of risk**

As discussed above, we are proposing to designate different categories of risk at different positions along the risk scale: ‘Normal’, ‘Concern’, ‘Distress’ and ‘Financial failure’. In order to ensure transparency and consistency in the use of the Risk Assessment Framework, each category would be associated with a number of possible actions that Monitor could take at that point.
When a provider’s risk score indicates that its risk is more serious than ‘Normal’, we propose that the following actions may be prompted:

- **Concern:** When a provider’s risk is rated in the ‘Concern’ category, Monitor may investigate whether a provider may be in breach of Continuity of Services licence condition 3 and may collect extra information. This information would allow us to monitor the situation more closely and to understand more fully the underlying cause of any deterioration in the provider’s financial position.

  As explained in section 8, at this stage, we may also require further financial protections, (including cash lock-ins and/or appropriate financial undertakings from the provider) in order to protect against the increased risk to the ongoing provision of CRS.

- **Distress:** In the ‘Distress’ phase, Monitor may consider whether it should issue a notice under Continuity of Services licence condition 6, and if so, require the provider to co-operate with an expert team appointed to assist with contingency planning. The team’s tasks would include defining what services should be protected if the provider were to enter the special administration regime.

- **Financial failure:** When a provider is considered to be in financial failure (because it is, or is likely to become, unable to pay its debts), Monitor would initiate the special administration process. In the case of an NHS foundation trust, this would involve making an order authorising the appointment of a trust special administrator. In the case of a licensee other than an NHS foundation trust, Monitor would apply to a court for an order which directs that the affairs of the provider are to be managed by an administrator. As explained earlier, both the Continuity of Services and specific NHS foundation trust licence conditions apply to NHS foundation trusts and Monitor may take action under either, or both, sets of conditions. The more serious the indication of risk, the more likely it is that any interventions around governance would be superseded by, or aimed at supporting, interventions based on the Continuity of Services licence conditions.

### A.5 Reporting requirements

We intend that the reporting requirements for the Risk Assessment Framework in ‘Normal’ operations should not represent a substantive change from the current requirements of NHS foundation trusts under their terms of authorisation. We now briefly set out our:

- standard reporting requirements; and
- additional reporting requirements for providers in certain risk categories.

#### Standard reporting requirements

**Core financial metrics**

Licensees will be required to submit data on specific metrics, for example, those listed in section 6.1, on a quarterly basis.

In addition, we would request the same data on a forward-looking basis, annually, with a brief description of the licensee’s annual plan. This is not expected to be a bespoke document for Monitor.
Financial override metrics

As we develop the financial overrides, Monitor will seek to ensure that the process of risk assessment remains reasonable, proportionate, evidence-based and, as may be appropriate, consistent. We are therefore carefully considering issues, such as the number of override metrics we may assess and the frequency with which override information is collected. We are also considering whether the override process should apply to all licensees every quarter, and for all possible override metrics, or only to those providers that have a rating of ‘Concern’ or worse, or those with a ‘Normal’ but deteriorating rating.

Clinical and Governance metrics

Monitor’s working assumption is that, typically, where a provider has a ‘Normal’ risk rating, Monitor will access clinical information from existing Care Quality Commission reports, thus not creating an additional monitoring burden.

Similarly, the standard approach to monitoring governance would be such that no additional data would be required from NHS foundation trusts beyond those collected as part of Monitor’s regulation of compliance with the NHS foundation trust governance licence conditions. For licensees other than NHS foundation trusts, we are keen to ensure that our approach is proportionate and wherever possible based on data that is readily available through the providers’ normal reporting processes.

Additional reporting requirements for licensees in ‘Concern’

Where a provider is rated in the ‘Concern’ risk category, Monitor may wish to request further information from the provider. Conversely, it may be appropriate to reduce the frequency of reporting and assessment, e.g. to every six months, for those licensees with consistently good risk ratings, for example, two years of ‘Normal’ performance.

A.6 Overseeing the governance of NHS foundation trusts

The Act gives Monitor two distinct, albeit overlapping, powers in relation to the governance of NHS foundation trusts. The first is the power to set licence conditions relating to governance. The second is, where Monitor is satisfied that the governance of an NHS foundation trust is such that the trust will fail to comply with the conditions of its licence, Monitor may include additional conditions relating to governance as it considers appropriate to reduce that risk. Where those additional conditions are breached, Monitor may use additional enforcement powers. The Risk Assessment Framework covers how Monitor will address the former.

Governance licence condition

The proposed licence condition draws on the existing condition 5 in the terms of authorisation that:

(1) The Trust shall ensure the existence of appropriate arrangements to provide representative and comprehensive governance in accordance with the Act and to maintain the organisational capacity necessary to deliver the mandatory goods and services referred to in Condition 7(1) and listed in Schedule 2 and the mandatory education and training referred to in Condition 7(2) and listed in Schedule 3.
The Trust shall comply with the principles of best practice applicable to corporate governance in the NHS/health sector, with any relevant code of practice and with any guidance which may be issued by Monitor.

as well as the board statements that all NHS foundation trusts are required to make as part of their Annual Plan Review submissions, and Monitor’s Quality Governance Framework.

The proposed licence condition is somewhat longer than the condition in the terms of authorisation; this is intended to clarify what is expected of NHS foundation trusts in relation to governance, rather than to impose new requirements. The licence condition groups components of governance into three - (i) leadership, (ii) organisational management and (iii) capability.

**Figure A.2: Components of governance**

<table>
<thead>
<tr>
<th>Area of governance</th>
<th>Summary of the licence condition’s requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Board leadership</td>
<td>The board provides effective leadership through appropriate board structures &amp; committees, clear responsibilities and lines of accountability – including appropriate levels of challenge and performance oversight. Business planning and other strategic decision-making processes are rigorous and robust.</td>
</tr>
<tr>
<td>Organisational management</td>
<td>The licensee has systems in place to ensure the provision of accurate and timely information, and operates effective systems of performance management and risk assessment. Where issues or risks are identified, they are appropriately escalated. The licensee’s internal processes and structures are sufficient to ensure ongoing compliance with the licence, health care standards and legal requirements. Systems of financial oversight and controls are sufficient to ensure the licensee can remain a going concern.</td>
</tr>
<tr>
<td>Quality governance</td>
<td>The licensee’s governance systems ensure effective oversight of the quality of care provided. This includes incorporating sufficient quality expertise at board level, and ensuring that quality considerations are appropriately reflected in business plans. In addition, the licensee should be able to monitor quality of care effectively, taking timely and appropriate action to address issues and listening to stakeholders where necessary.</td>
</tr>
<tr>
<td>Capability</td>
<td>The licensee should have systems in place to ensure there is sufficient capability at all levels to secure compliance with its licence.</td>
</tr>
</tbody>
</table>
Monitor will consult later this year on how risk to these components of governance will be assessed. The information provided here is intended to inform responses to this consultation on the licence conditions, and not to be a definitive guide as to how Monitor will assess risk.

Currently, Monitor is considering the use of a number of approaches to assist it to assess general governance at NHS foundation trusts. These include:

- using a series of proxy measures for governance proxies to trigger further investigation, i.e. performance against a limited set of metrics linked to overall organisational governance;
- monitoring an NHS foundation trust’s actions generally;
- having regard to an NHS foundation trust’s governance in the light of relevant good practice and/or guidance;
- carrying out regular reviews of governance in each NHS foundation trust, i.e., every 3-4 years. Monitor would assess the governance of an NHS foundation trust against the requirements of the governance licence condition;
- requiring NHS foundation trusts to produce statements of how they intend to ensure compliance with governance and other obligations at the beginning of the year, and requiring auditors to report on progress at the end of the year; and
- where the above have identified a potential governance issue at a foundation trust, a deeper review of governance.

Conceptually, these monitoring mechanisms are not dissimilar to the mechanisms employed today.

Figure A.3 explores the options further.

**Figure A.3: Processes to oversee compliance with governance licence condition**

<table>
<thead>
<tr>
<th>Examples of oversight mechanisms</th>
<th>Regulatory considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proxy measures</td>
<td>Monitor currently uses performance against a set of health care targets and indicators as a proxy for governance at NHS foundation trusts and we are considering continuing this. The health care targets and indicators are currently drawn from the NHS Operating Framework. According to the 2012 Act, the Secretary of State may publish guidance on objectives specified in the mandate that he issues to the NHS Commissioning Board which he considers</td>
</tr>
</tbody>
</table>
relevant to Monitor’s exercise of its functions. Hence Monitor would consider measures specified in that mandate in setting proxies for governance.

Where an NHS foundation trust’s overall performance against these metrics gives Monitor **reasonable grounds** to consider the trust may be in breach of, or at risk of breaching, the governance licence condition, Monitor may take action. This could take the form of a triggered review of governance (see below), the imposition of another licence condition or use of other formal enforcement powers.

| General monitoring | While we have identified a number of specific indicators for assessing compliance with the governance condition above, we may also consider whether, in the round, other factors may represent a breach, or potential risk of breach of the condition. Where Monitor reasonably believes that this is the case we may consider taking action. This could take the form of a triggered review of governance (see below), the imposition of another licence condition or use of other formal enforcement powers.

We do not consider such triggers would present themselves often, but these could include, for example, CQC warning notices, major transactions or significant reputational issues. |

| Triggered reviews | Where trusts are in significant breach of their terms of authorisation, Monitor has in the past used its powers of direction to require governance reviews.

We are considering whether, where we have **reasonable grounds** to conclude that a breach of the governance licence condition has occurred, or will occur, Monitor should review the governance of the trust in question. This may comprise a review of general governance, quality governance or both.

Where the findings of such reviews provide sufficient evidence to conclude that a foundation trust has breached, or is failing to take sufficient steps to reduce the risk of a breach of a condition, Monitor may subsequently choose to take action. Monitor has a number of powers to address licence breaches. The findings of such a triggered review would inform the actions taken. |

| Regular reviews | As part of overseeing compliance with the governance condition, we are also considering a regular review of governance – i.e. every 3-4 years – at NHS foundation trusts. Governance issues may arise at foundation trusts several years after authorisation. A re-assessment of the governance of a foundation trust at a suitable interval after its authorisation would not only allow Monitor to assess compliance with the governance licence condition directly but also add a further level of forward assurance.

As with triggered reviews above, where the findings of such reviews |
reasonably indicated a breach, or risk of breach, of the licence, Monitor may subsequently choose to take action. Monitor has a number of powers to address breaches of the governance licence condition, and the findings of such a review would inform the actions taken.

| Audit | Monitor currently requires NHS foundation trusts to include specified content in their Annual Governance Statements. This content includes processes to secure good financial and quality governance. Monitor also currently requires auditors to provide a limited assurance opinion on the Annual Governance Statement (i.e., the auditors are not aware of any evidence that would suggest the Annual Governance Statement is not a true and fair view).

We are considering broadening the scope of such work by:

- Requiring NHS foundation trusts to produce, at the beginning of each year, a document confirming current and forward expected compliance with obligations including any actions to address risks to this; and

- Requiring the auditors at the end of each year to give a limited assurance opinion on whether any such actions have been carried out.

Where opinions are qualified, Monitor could then take further action to determine whether the NHS foundation trust is in breach of the governance condition. |

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### Assessing overall compliance with the licence

In addition to assessing compliance with the governance condition, the Act also gives Monitor additional enforcement powers where the governance of an NHS foundation trust is such that it will fail to comply with all or any conditions in its licence. Monitor has a specific power to address this by inserting additional conditions in the licence to address the failing in governance. Monitor is considering assessing the role of governance in ensuring compliance with the licence through the mechanisms in figure A.4:

**Figure A.4 Processes to oversee general governance**

<table>
<thead>
<tr>
<th>Oversight mechanism</th>
<th>Regulatory considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>General monitoring</td>
<td>The licence includes a wide range of requirements for NHS foundation trusts and other licence holders. Monitor may take action where a trust’s governance is causing either a breach or a risk of a breach of the licence.</td>
</tr>
</tbody>
</table>

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The Annual Governance Statement was formerly known as the Statement on Internal Control.
Where NHS foundation trusts are in breach of a licence condition and Monitor believes that governance is a contributory factor, Monitor may consider taking action. One example might be a breach of a Continuity of Services condition arising from poor planning. The action could be a triggered review of governance (see below) to establish how far governance is a contributory factor, or the imposition of an additional licence condition. Monitor may also use its other formal enforcement powers.

Where it comes to Monitor’s attention that an NHS foundation trust is not taking steps to reduce the risk of a breach of its licence, and that governance is a contributory factor, Monitor may again take action. The action could be a triggered review of governance (see below) to establish how far governance is a contributory factor, or the imposition of an additional licence condition to address the governance issue.

| Triggered reviews | Under the *Compliance Framework*, where trusts are in significant breach of their terms of authorisation, Monitor may use its powers of direction to require governance reviews, with foundation trusts implementing recommendations to address any findings subsequently arising.

We are considering whether where we believe that the governance of an NHS foundation trust is such that it has breached the conditions of its licence, or is at risk of this, we could require a review of governance.

Where the findings of such reviews provide sufficient evidence for Monitor to conclude that the governance of an NHS foundation trust is such that it has breached, or is failing to take steps to reduce the risk of a breach of, its licence, Monitor may subsequently choose to take action. Monitor has a number of powers to address governance-related breaches of the licence, and we envisage the findings of such a triggered review would inform the actions taken. |
Annexe Two: Proposed licence for consultation

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   FT4: NHS Foundation Trust governance arrangements

Section 7 – Interpretation and Definitions
   D1: Interpretation and Definitions
Section 1 – General obligations

Section 1 – General obligations

Condition G1 – Provision of information

1. Subject to paragraph 3, and in addition to obligations under other Conditions of this Licence, the Licensee shall furnish to Monitor such information and documents, and shall prepare or procure and furnish to Monitor such reports, as Monitor may require for any of the purposes set out in section 96(2) of the 2012 Act.

2. Information, documents and reports required to be furnished under this Condition shall be furnished in such manner, in such form, at such place and at such times as Monitor may require.

3. In furnishing information documents and reports pursuant to paragraphs 1 and 2 the Licensee shall take all reasonable steps to ensure that:

   (a) in the case of information or a report, it is accurate, complete and not misleading;

   (b) in the case of a document, it is a true copy of the document requested; and

   (c) in any case it is supplied in accordance with such requirements as to form and delivery as Monitor may require.

4. This Condition shall not require the Licensee to furnish any information, documents or reports which it could not be compelled to produce or give in evidence in civil proceedings before a court because of legal professional privilege.
Section 1 – General obligations

**Condition G2 – Publication of information**

1. The Licensee shall comply with any direction from Monitor for any of the purposes set out in section 96(2) of the 2012 Act to publish information about health care services provided for the purposes of the NHS and as to the manner in which such information should be published.

2. For the purposes of this condition “publish” includes making available to the public, to any section of the public or to individuals.
Section 1 – General obligations

**Condition G3 – Payment of fees to Monitor**

1. The Licensee shall pay fees to Monitor in each financial year of such amount as Monitor may determine for each such year or part thereof in respect of the exercise by Monitor of its functions for the purposes set out in section 96(2) of the 2012 Act.

2. The Licensee shall pay the fees required to be paid by a determination by Monitor for the purpose of paragraph 1 no later than the 28th day after they become payable in accordance with that determination.
Section 1 – General obligations

**Condition G4 – Fit and proper persons as Governors and Directors (also applicable to those performing equivalent or similar functions)**

1. If the Licensee is an NHS Foundation Trust, the Licensee shall ensure that no person who is an unfit person may become or continue as a Governor.

2. The Licensee shall not appoint as a Director any person who is an unfit person.

3. The Licensee shall ensure that its contracts of service with its Directors contain a provision permitting summary termination in the event of a Director being or becoming an unfit person, and that it enforces those provisions promptly upon discovering any Director to be an unfit person.

4. In this Condition an unfit person is:

   (a) an individual;
   
   (i) who has been adjudged bankrupt or whose estate has been sequestrated and (in either case) has not been discharged; or
   
   (ii) who has made a composition or arrangement with, or granted a trust deed for, his creditors and has not been discharged in respect of it; or
   
   (iii) who within the preceding five years has been convicted in the British Islands of any offence and a sentence of imprisonment (whether suspended or not) for a period of not less than three months (without the option of a fine) was imposed on him; or
   
   (iv) who is subject to an unexpired disqualification order made under the Company Directors’ Disqualification Act 1986; or

   (b) a body corporate, or a body corporate with a parent body corporate:
   
   (i) where one or more of the Directors of the body corporate or its parent body corporate is an unfit person under the provisions of paragraphs (a) of this paragraph of this Condition, or
   
   (ii) in relation to which a voluntary arrangement is proposed under section 1 of the Insolvency Act 1986, or
Section 1 – General obligations

(iii) which has a receiver (including an administrative receiver within the meaning of section 29(2) of the 1986 Act) appointed for the whole or any material part of its assets or undertaking, or

(iv) which has an administrator appointed to manage its affairs, business and property in accordance with Schedule B1 to the 1986 Act, or

(v) which passes any resolution for winding up, or

(vi) which becomes subject to an order of a Court for winding up.
Section 1 – General obligations

Condition G5 – Monitor guidance

1 Without prejudice to any obligations in other Conditions of this Licence, the Licensee shall at all times have regard to guidance issued by Monitor for any of the purposes set out in section 96(2) of the 2012 Act.

2 In any case where the Licensee decides not to follow the guidance referred to in paragraph 1 or guidance issued under any other Conditions of this licence, it shall inform Monitor of the reasons for that decision.
Section 1 – General obligations

Condition G6 – Systems for compliance with licence conditions and related obligations

Option A

1. In addition to obligations under other Conditions of this Licence, the Licensee shall take all reasonable precautions against the risk of failure to comply with:

   (a) the Conditions of this Licence,

   (b) any requirements imposed on it under the NHS Acts, and

   (c) the requirement to have regard to the NHS Constitution in providing health care services for the purposes of the NHS.

2. Without prejudice to the generality of the obligation placed on the Licensee by paragraph 1, the Licensee shall ensure that:

   (a) at all times it employs an appropriate person in the role of “Compliance Officer” for the purpose of facilitating compliance by the Licensee with the Conditions contained in this Licence and to act as a contact point for Monitor;

   (b) the Compliance Officer reports directly to a member of the board of Directors of the Licensee, charged with responsibility for the Licensee’s compliance with this Condition, and

   (c) the Compliance Officer is provided with such staff and facilities as he may reasonably require to perform the tasks assigned to him or her pursuant to this Condition.

3. The Licensee shall assign to the Compliance Officer all responsibilities and duties it reasonably considers necessary for the purposes of facilitating compliance by the Licensee with its obligations under the Licence including, but not restricted to:

   (a) the establishment and implementation of procedures, systems and processes for ensuring that:

       (i) the Conditions of this Licence, and

       (ii) the precautions referred to in paragraph 1,

       are effectively complied with; and

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Section 1 – General obligations

(b) the giving of advice to Directors and employees of the Licensee or any Related Person of the Licensee for facilitating compliance with the Conditions of this Licence and the procedures systems and processes established under paragraph (a).

4. The Licensee shall, as soon as practicable after the end of each financial year, furnish to Monitor and publish in such form and manner as Monitor may direct, a comprehensive report on the precautions taken by the Licensee in order to comply with this Condition during that year.

Option B

1. The Licensee shall take all reasonable precautions against the risk of failure to comply with:

   (a) the Conditions of this Licence,
   (b) any requirements imposed on it under the NHS Acts, and
   (c) the requirement to have regard to the NHS Constitution in providing health care services for the purposes of the NHS.

2. Without prejudice to the generality of paragraph 1, the steps that the Licensee must take pursuant to that paragraph shall include:

   (a) the establishment and implementation of processes and systems to identify risks and guard against their occurrence; and
   (b) regular review of whether those processes and systems have been implemented and of their effectiveness.

3. Not later than two months from the end of each Financial Year, the Licensee shall prepare and submit to Monitor a certificate to the effect that, following a review for the purpose of paragraph 2(b) the Directors of the Licensee are or are not satisfied that, in the Financial Year most recently ended, the Licensee took all such precautions as were necessary in order to comply with this Condition.

4. The Licensee shall publish each certificate submitted for the purpose of this Condition within one month of its submission to Monitor in such manner as is likely to bring it to the attention of such persons who reasonably can be expected to have an interest in it.
Section 1 – General obligations

**Condition G7 – Registration with the Care Quality Commission**

1. The Licensee shall at all times be registered with the Care Quality Commission in so far as is necessary in order to be able lawfully to provide the services authorised to be provided by this Licence.

2. The Licensee shall advise Monitor promptly and in any event within 7 days of:
   - the expiry,
   - the loss, cancellation, withdrawal or other termination without renewal,
   - the suspension, or
   - any modification to the terms

   of its registration with the Care Quality Commission.
Section 1 – General obligations

Condition G8 – Patient eligibility and selection criteria

1. The Licensee shall:

   (a) set transparent eligibility and selection criteria,

   (b) apply those criteria in a transparent way to persons who, having a choice of
        persons from whom to receive health care services for the purposes of the
        NHS, choose to receive them from the Licensee, and

   (c) publish those criteria in such a manner as will make them readily accessible by
        any persons who could reasonably be regarded as likely to have an interest in
        them.

2. “Eligibility and selection criteria” means criteria for determining:

   (a) whether a person is eligible, or is to be selected, to receive health care services
       provided by the Licensee for the purposes of the NHS, and

   (b) if the person is selected, the manner in which the services are provided to the
       person.
Section 1 – General obligations

**Condition G9 – Effectiveness, efficiency and economy**

1. The Licensee shall carry out the activities authorised by this licence effectively, efficiently and economically.
Section 1 – General obligations

**Condition G10 – Application of Section 5 (Continuity of Services)**

1. The Conditions in Section 5 shall apply whenever the Licensee is subject to an obligation under a contract with a Commissioner to provide a service as a Commissioner Requested Service (irrespective of whether the Licensee provides that service) and shall continue to apply thereafter until the service ceases to be a Commissioner Requested Service in accordance with this Condition.

2. A service is a Commissioner Requested Service if, and to the extent that, it is:

   (a) any service of a description which the Licensee was required to provide in accordance with Schedule 2 to the terms of its authorisation by Monitor immediately prior to the commencement of this Licence, or

   (b) any other service in respect of which a Commissioner has made a written request to the Licensee pursuant to a contract with the Licensee, and the Licensee has agreed, to provide that service as a Commissioner Requested Service,

which has not ceased to be a Commissioner Requested Service in accordance with this Condition.

3. A service shall cease to be a Commissioner Requested Service if:

   (a) Monitor has issued a determination in writing that the service is no longer a Commissioner Requested Service, or

   (b) all current Commissioners of that service as a Commissioner Requested Service agree in writing that there is no longer any need for the service to be a Commissioner Requested Service, and Monitor has issued a determination in writing that the service is no longer a Commissioner Requested Service.

4. The Licensee shall not unreasonably refuse to agree to provide a service as a Commissioner Requested Service and shall be presumed to have agreed if, within 28 days from receipt of a request from a Commissioner in accordance with paragraph 2(b), it has not given notice to both the Commissioner and Monitor in writing that it disagrees with that request.
Section 1 – General obligations

5. The Licensee shall make available free of charge to any person who requests it a statement in writing setting out those services which it is required to provide as Commissioner Requested Services.
General conditions no longer proposed following the stakeholder engagement

Compliance with statutory and other requirements

1. The Licensee shall take all reasonable steps in order to comply with:

   (i) any requirements imposed on it under the NHS Acts;

   (ii) the requirement to have regard to the NHS Constitution in providing health care services for the purposes of the NHS; and

   (iii) applicable directions issued by the Secretary of State with respect to safety and security in connection with the provision of high security psychiatric services.


General conditions no longer proposed following the stakeholder engagement

**Emergency planning**

1. The Licensee shall assist all relevant authorities with, and participate in, local and national emergency planning and the provision of a response to any emergency in accordance with such emergency plans.
Condition P1 – Recording of information

1. If required in writing by Monitor, and only in relation to periods from the date of that requirement, the Licensee shall:

   (a) obtain, record and maintain sufficient information about the costs which it expends in the course of providing services for the purposes of the NHS and other relevant information, and

   (b) establish, maintain and apply such systems and methods for the obtaining, recording and maintaining of those costs and other relevant information, as are necessary to enable it to comply with the following paragraphs of this Condition.

2. From the time of publication by Monitor of Approved Reporting Currencies the Licensee shall maintain records of its costs and of other relevant information broken down in accordance with those Currencies by allocating to a record for each such Currency all costs expended by the Licensee in providing health care services for the purposes of the NHS within that Currency and by similarly treating other relevant information.

3. In the allocation of costs and other relevant information to Approved Reporting Currencies in accordance with paragraph 2 the Licensee shall use the cost allocation methodology and procedures relating to other relevant information set out in the Approved Guidance.

4. If the Licensee uses sub-contractors in the provision of health services for the purposes of the NHS the Licensee shall procure that each of those sub-contractors:

   (a) obtains, records and maintains sufficient information about the costs which it expends in the course of providing services as sub-contractor to the Licensee, and establishes, maintains and applies such systems and methods for the obtaining, recording and maintaining of that information as are necessary to enable it to provide to the Licensee such information as will enable the Licensee to comply with its obligations under this Condition in respect of costs incurred with that sub-contractor, and

   (b) provides the Licensee with that information in a timely manner.

5. Records required to be maintained by this Condition shall be kept for not less than six years.
Section 2 – Pricing

6. In this Condition:

<table>
<thead>
<tr>
<th>“the Approved Guidance”</th>
<th>means such guidance on the obtaining, recording and maintaining of information about costs and on the breaking down and allocation of costs by reference to Approved Reporting Currencies as may be published by Monitor;</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Approved Reporting Currencies”</td>
<td>means such categories of cost and other relevant information as may be published by Monitor;</td>
</tr>
<tr>
<td>“other relevant information”</td>
<td>means such information, which may include quality and outcomes data, as may be required by Monitor for the purpose of its functions under Chapter 4 (pricing) in Part 3 of the 2012 Act.</td>
</tr>
</tbody>
</table>
Section 2 – Pricing

**Condition P2 – Provision of information**

1. Subject to paragraph 3, and without prejudice to the generality of Condition G1, the Licensee shall furnish to Monitor such information and documents, and shall prepare or procure and furnish to Monitor such reports, as Monitor may require for the purpose of performing its functions under Chapter 4 in Part 3 of the 2012 Act.

2. Information, documents and reports required to be furnished under this Condition shall be furnished in such manner, in such form, at such place and at such times as Monitor may require.

3. In furnishing information documents and reports pursuant to paragraphs 1 and 2 the Licensee shall take all reasonable steps to ensure that:

   (a) in the case of information or a report, it is accurate, complete and not misleading;

   (b) in the case of a document, it is a true copy of the document requested; and

   (c) in any case it is supplied in accordance with such requirements as to form and delivery as Monitor may require.

4. This Condition shall not require the Licensee to furnish any information, documents or reports which it could not be compelled to produce or give in evidence in civil proceedings before a court because of legal professional privilege.
Section 2 – Pricing

Condition P3 – Assurance report on submissions to Monitor

1. If required in writing by Monitor the Licensee shall, as soon as reasonably practicable, obtain and submit to Monitor an assurance report in relation to a submission of the sort described in paragraph 2 which complies with the requirements of paragraph 3.

2. The descriptions of submissions in relation to which a report may be required under paragraph 1 are:

   (a) submissions of information furnished to Monitor pursuant to Condition P2, and

   (b) submissions of information to third parties designated by Monitor as persons from or through whom cost information may be obtained for the purposes of setting or verifying the National Tariff or of developing non-tariff pricing guidance.

3. An assurance report shall meet the requirements of this paragraph if all of the following conditions are met:

   (a) it is prepared by a person approved in writing by Monitor or qualified to act as auditor of an NHS Foundation Trust in accordance with paragraph 23(4) in Schedule 7 to the 2006 Act;

   (b) it expresses a view on whether the submission to which it relates:

      (i) is based on cost records which have been maintained in a manner which complies with paragraph 2 in Condition P1;

      (ii) is based on costs which have been analysed in a manner which complies with paragraph 3 in Condition P1, and

      (iii) provides a true and fair assessment of the information it contains.
Section 2 – Pricing

Condition P4 – Compliance with the National Tariff

1. Except as approved in writing by Monitor, the Licensee shall only provide health care services for the purpose of the NHS at prices which comply with, or are determined in accordance with the national tariff published by Monitor, in accordance with section 116 of the 2012 Act.

2. Without prejudice to the generality of paragraph 1, except as approved in writing by Monitor, the Licensee shall comply with the rules, and apply the methods, concerning charging for the provision of health care services for the purposes of the NHS contained in the national tariff published by Monitor in accordance with section 116 of the 2012 Act, wherever applicable.
Section 2 – Pricing

**Condition P5 – Constructive engagement concerning local tariff modifications**

1. The Licensee shall engage constructively with Commissioners, with a view to reaching agreement as provided in section 124 of the 2012 Act, in any case in which it is of the view that the price payable for the provision of a service for the purposes of the NHS in certain circumstances or areas should be the price determined in accordance with the national tariff for that service subject to modifications.
Section 3 – Choice and Competition

Section 3 – Choice and Competition

Condition C1- The right of patients to make choices

Option A

2. At every point subsequent to a person becoming a patient of the Licensee and for as long as he or she remains such a patient, where that person has a right to choice of provider, the Licensee shall notify him or her of that right and tell him or her where information about that choice can be found.

3. Information and advice made available by the Licensee, pursuant to paragraph 1 and subsequently, shall not be misleading.

4. Without prejudice to paragraph 2, information and advice made available by the Licensee pursuant to paragraph 1 shall not unfairly favour one provider over another and shall be presented in a manner that, as far as reasonably practicable, assists patients in making well informed choices between providers of treatments or other health care services.

5. In the conduct of any activities, and in the provision of any material, for the purpose of promoting itself as a provider of health care services for the purposes of the NHS the Licensee shall not offer or give gifts, benefits in kind, or pecuniary or other advantages to clinicians, other health professionals, Commissioners or their administrative or other staff as inducements to refer patients or commission services.
Section 3 – Choice and Competition

Option B

1. At every point subsequent to a person becoming a patient of the Licensee and for as long as he or she remains such a patient:

   (a) where that person has a right to choice of provider, the Licensee shall notify him or her of that right and tell him or her where information about that choice can be found, and

   (b) where that person has the right to choose between treatments or other health care services which are provided by the Licensee and by another provider, the Licensee shall make reasonable arrangements to ensure that he or she is provided with impartial advice about the choices available.

2. Information and advice made available by the Licensee, pursuant to paragraph 1 and subsequently, shall not be misleading.

3. Without prejudice to paragraph 2, information and advice made available by the Licensee pursuant to paragraph 1 shall not unfairly favour one provider over another and shall be presented in a manner that, as far as reasonably practicable, assists patients in making well informed choices between providers of treatments or other health care services.

4. In the conduct of any activities, and in the provision of any material, for the purpose of promoting itself as a provider of health care services for the purposes of the NHS the Licensee shall not offer or give gifts, benefits in kind, or pecuniary or other advantages to clinicians, other health professionals, Commissioners or their administrative or other staff as inducements to refer patients or commission services.
Section 3 – Choice and Competition

**Condition C2 – Competition oversight**

1. The licensee shall not:

   (a) enter into or maintain any agreement or other arrangement which has the object or effect of preventing, restricting or distorting competition in the provision of health care services for the purposes of the NHS, or

   (b) engage in any other conduct which has the effect of preventing, restricting or distorting competition in the provision of health care services for the purposes of the NHS,

   to the extent that it against the interests of people who use health care services.
Section 3 – Choice and Competition

Condition C3 – Informing the Office of Fair Trading of mergers

1. Before entering into any arrangement under which, or a transaction in consequence of which, the activities or part of the activities of the Licensee, and the activities of one or more other businesses providing health care services, cease to be distinct activities, the Licensee shall:

(a) give notice in writing to the Office of Fair Trading, and

(b) at the same time as it gives notice to the Office of Fair Trading, give a copy of that notice to Monitor.

2. This Condition shall cease to have effect at the end of the period of five years beginning with the day on which this Licence was granted.
Section 4 – Integrated care

Condition IC1 – Provision of integrated care

Option A

1. The Licensee shall take all reasonable steps for the purpose of enabling its provision of health care services for the purposes of the NHS to be integrated with the provision of such services by others with a view to achieving one or more of the objects referred to in paragraph 4.

2. The Licensee shall take all reasonable steps for the purpose of enabling its provision of health care services for the purposes of the NHS to be integrated with the provision of health-related services or social care services by others with a view to achieving one or more of the objects referred to in paragraph 4.

3. The Licensee shall take all reasonable steps for the purpose of enabling it to co-operate with other providers of health care services for the purposes of the NHS with a view to achieving one or more of the objectives referred to in paragraph 4.

4. The objectives referred to in paragraphs 1, 2 and 3 are:
   (a) improving the quality of health care services provided for the purposes of the NHS (including the outcomes that are achieved from their provision) or the efficiency of their provision,
   (b) reducing inequalities between persons with respect to their ability to access those services, and
   (c) reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.

5. The Licensee shall have regard to such guidance as may have been issued by Monitor from time to time concerning the steps that might reasonably be regarded as necessary for the purposes of paragraphs 1, 2 or 3 of this Condition.
Section 4 – Integrated care

Option B

1. The Licensee shall not do anything that reasonably would be regarded as detrimental to enabling its provision of health care services for the purposes of the NHS to be integrated with the provision of such services by others with a view to achieving one or more of the objects referred to in paragraph 4.

2. The Licensee shall not do anything that reasonably would be regarded as detrimental to enabling its provision of health care services for the purposes of the NHS to be integrated with the provision of health-related services or social care services by others with a view to achieving one or more of the objects referred to in paragraph 4.

3. The Licensee shall not do anything that reasonably would be regarded as detrimental to enabling it to co-operate with other providers of health care services for the purposes of the NHS with a view to achieving one or more of the objectives referred to in paragraph 4.

4. The objectives referred to in paragraphs 1, 2 and 3 are:

   (a) improving the quality of health care services provided for the purposes of the NHS (including the outcomes that are achieved from their provision) or the efficiency of their provision,

   (b) reducing inequalities between persons with respect to their ability to access those services, and

   (c) reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.

5. The Licensee shall have regard to such guidance as may have been issued by Monitor from time to time concerning actions or behaviours that might reasonably be regarded as prejudicial for the purposes of paragraphs 1, 2 or 3 of this Condition.
Option C

1. The Licensee shall not unreasonably block the integration of its provision of health care services for the purposes of the NHS with the provision of such services by others with a view to achieving one or more of the objects referred to in paragraph 4.

2. The Licensee shall not unreasonably block the integration of its provision of health care services for the purposes of the NHS with the provision of health-related services or social care services with a view to achieving one or more of the objects referred to in paragraph 4.

3. The Licensee shall not unreasonably block co-operation between itself and other providers of health care services for the purposes of the NHS with a view to achieving one or more of the objectives referred to in paragraph 4.

4. The objectives referred to in paragraphs 1, 2 and 3 are:

   (a) improving the quality of health care services provided for the purposes of the NHS (including the outcomes that are achieved from their provision) or the efficiency of their provision,

   (b) reducing inequalities between persons with respect to their ability to access those services, and

   (c) reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.

5. The Licensee shall have regard to such guidance as may have been issued by Monitor from time to time concerning actions or behaviours that might reasonably be regarded as blocking for the purposes of paragraphs 1, 2 or 3 of this Condition.
Section 5 – Continuity of Services

Section 5 – Continuity of Services

Condition CoS1 – Continuing provision of Commissioner Requested Services

1. The Licensee shall not cease to provide, or materially alter the specification or means of provision of, any Commissioner Requested Service otherwise than in accordance with the following paragraphs of this Condition.

2. The obligations in this Condition shall not apply to a service which ceases to be a Commissioner Requested Service in accordance with Condition G10(3), from the time of that cessation.

3. The Licensee shall not materially alter the specification or means of provision of any Commissioner Requested Service except:
   (a) with the agreement in writing of all Commissioners to which the Licensee is required by contract to provide the service as a Commissioner Requested Service; or
   (b) if required or permitted to do so by the Care Quality Commission; or
   (c) as a result of an alteration to the terms, or of the cessation, of the registration of the Licensee with the Care Quality Commission.

4. The Licensee shall not materially alter the specification or means of provision of a Commissioner Requested Service unless:
   (a) it has notified Monitor in writing of its intention to make that alteration, and
   (b) Monitor has issued a determination in writing that the alteration is approved.

5. For the purposes of this Condition an alteration to the specification or means of provision of any Commissioner Requested Service is material if it involves the delivery or provision of that service in a manner which differs from the manner specified and described in:
   (a) the contract in which it was first required to be provided to a Commissioner at or following the coming into effect of this Condition; or
Section 5 – Continuity of Services

(b) if there has been an alteration pursuant to paragraph 3, the document in which it was specified on the coming into effect of that alteration.
Section 5 – Continuity of Services

Condition CoS2 – Restriction on the disposal of assets

1. The Licensee shall establish, maintain and keep up to date, an asset register which complies with paragraphs 2 and 3 of this Condition ("the Asset Register")

2. The Asset Register shall list every relevant asset used by the Licensee.

3. The Asset Register shall be established, maintained and kept up to date in a manner that reasonably would be regarded as both adequate and professional.

4. The Licensee shall not dispose of, or relinquish control over, any relevant asset except:

   (a) with the consent in writing of Monitor, and

   (b) in accordance with the paragraphs 5 to 7 of this Condition.

5. The Licensee shall furnish Monitor with such information as Monitor may request relating to any proposal by the Licensee to dispose of, or relinquish control over, any relevant asset.

6. Where consent by Monitor for the purpose of paragraph 4(a) is subject to conditions, the Licensee shall comply with those conditions.

7. Paragraph 4(a) of this Condition shall not prevent the Licensee from disposing of, or relinquishing control over, any relevant asset where:

   (a) Monitor has issued a general consent for the purposes of this Condition (whether or not subject to conditions) in relation to:

      (i) transactions of a specified description; or

      (ii) the disposal of or relinquishment of control over relevant assets of a specified description, and

      the transaction or the relevant assets are of a description to which the consent applies and the disposal, or relinquishment of control, is in accordance with any conditions to which the consent is subject; or

   (b) the Licensee is required by the Care Quality Commission to dispose of a relevant asset.
Section 5 – Continuity of Services

8. In this Condition:

<table>
<thead>
<tr>
<th>“disposal”</th>
<th>means any of the following:</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>(a) a transfer, whether legal or equitable, of the whole or any part of an asset (whether or not for value) to</td>
</tr>
<tr>
<td></td>
<td>a person other than the Licensee; or</td>
</tr>
<tr>
<td></td>
<td>(b) a grant, whether legal or equitable, of a lease, licence, or loan of (or the grant of any other right of</td>
</tr>
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<td></td>
<td>possession in relation to) that asset; or</td>
</tr>
<tr>
<td></td>
<td>(c) the grant, whether legal or equitable, of any mortgage, charge, or other form of security over that</td>
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<td>asset; or</td>
</tr>
<tr>
<td></td>
<td>(d) if the asset is an interest in land, any transaction or event that is capable under any enactment or</td>
</tr>
<tr>
<td></td>
<td>rule of law of affecting the title to a registered interest in that land, on the assumption that the title is</td>
</tr>
<tr>
<td></td>
<td>registered, and references to “dispose” are to be read accordingly;</td>
</tr>
</tbody>
</table>

| “relevant asset”        | means any item of property, including buildings, interests in land, equipment (including rights, licenses    |
|                         | and consents relating to its use), without which the Licensee’s ability to meet its obligation to provide   |
|                         | Commissioner Requested Services would reasonably be regarded as materially prejudiced;                     |

| “relinquishment of control” | includes entering into any agreement or arrangement under which control of the asset is not, or ceases to |
|                             | be, under the sole management of the Licensee, and “relinquish” and related expressions are to be read    |
|                             | accordingly.                                                                                                 |

9. The Licensee shall have regard to such guidance as may be issued from time to time by Monitor regarding:

(a) the manner in which asset registers should be established, maintained and updated, and

(b) property, including buildings, interests in land, intellectual property rights and equipment, without which a licence holder’s ability to provide Commissioner Requested Services should be regarded as materially prejudiced.
Section 5 – Continuity of Services

**Condition CoS3 – Monitor Risk Rating**

1. The Licensee shall at all times adopt and apply systems and standards of corporate governance and of financial management which reasonably would be regarded as:

   (a) suitable for a provider of the Commissioner Requested Services provided by the Licensee, and

   (b) providing reasonable safeguards against the risk of the Licensee being unable to carry on as a going concern.

2. In its determination of the systems and standards to adopt for the purpose of paragraph 1, and in the application of those systems and standards, the Licensee shall have regard to:

   (a) such guidance as Monitor may issue from time to time concerning systems and standards of corporate governance and financial management;

   (b) the Licensee’s rating using the risk rating methodology published by Monitor from time to time, and

   (c) the desirability of that rating being not less than the level regarded by Monitor as acceptable under the provisions of that methodology.
Section 5 – Continuity of Services

Condition CoS4 – Undertaking from the ultimate controller

1. Subject to paragraph 4, the Licensee shall procure from each company or other person which the Licensee knows or reasonably ought to know is at any time its ultimate controller, a legally enforceable undertaking in favour of the Licensee, in the form specified by Monitor, that the ultimate controller (“the Covenantor”) will refrain from any action, and will procure that any person which is a subsidiary of, or which is controlled by, the Covenantor (other than the Licensee and its subsidiaries) will:

   (a) refrain from any action which would be likely to cause the Licensee to be in contravention of any of its obligations under the 2012 Act or this Licence, and

   (b) give to the Licensee all such information in its possession or control as may be necessary to enable the Licensee to comply fully with its obligations under this Licence to provide information to Monitor.

2. The Licensee shall obtain any undertaking required to be procured for the purpose of paragraph 1 within 7 days of a company or other person becoming an ultimate controller of the Licensee and shall ensure that any such undertaking remains in force for as long as the Covenantor remains the ultimate controller of the Licensee.

3. The Licensee shall:

   (a) deliver to Monitor a copy of each such undertaking within seven days of obtaining it;

   (b) inform Monitor immediately in writing if any Director, secretary or other officer of the Licensee becomes aware that any such undertaking has ceased to be legally enforceable or that its terms have been breached, and

   (c) comply with any request which may be made by Monitor to enforce any such undertaking.

4. For the purpose of this Condition a person (whether an individual or a body corporate) is an ultimate controller of the Licensee if:

   (a) directly, or indirectly, the Licensee can be required to act in accordance with the instructions of that person acting alone or in concert with others, and

   (b) that person cannot be so required to act in accordance with the instructions of any other person, and
(c) that person does not fall within clause (a) or (b) above by virtue of their being:

(i) a health service body within the meaning of that term for the purpose of section 9(4) of the National Health Services Act 2006,

(ii) if the Licensee is an NHS foundation trust, a Governor of the Licensee, or

(iii) if the Licensee is an NHS foundation trust, a Director of the Licensee.
Section 5 – Continuity of Services

**Condition CoS5 – Risk pool levy**

1. The Licensee shall pay to Monitor any sums required to be paid in consequence of any requirement imposed on providers under section 135(2) of the 2012 Act, including sums payable by way of levy imposed under section 139(1) and any interest payable under section 143(10), by the dates by which they are required to be paid.

2. In the event that no date has been clearly determined by which a sum referred to in paragraph 1 is required to be paid, that sum shall be paid within 28 days of being demanded in writing by Monitor.
Section 5 – Continuity of Services

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

1. The obligations in paragraph 2 shall apply if Monitor has given notice in writing to the Licensee that it is concerned about the ability of the Licensee to carry on as a going concern.

2. When this paragraph applies the Licensee shall:

   (a) provide such information as Monitor may direct to Commissioners and to such other persons as Monitor may direct;

   (b) allow such persons as Monitor may appoint to enter premises owned or controlled by the Licensee and to inspect the premises and anything on them, and

   (c) co-operate with such persons as Monitor may appoint to assist in the management of the Licensee’s affairs, business and property.
Section 5 – Continuity of Services

**Condition CoS7 – Availability of resources**

1. The Licensee shall at all times act in a manner calculated to secure that it has, or has access to, the Required Resources.

2. The Licensee shall not enter into any agreement or undertake any activity which creates a material risk that the Required Resources will not be available to the Licensee.

3. The Licensee, not later than two months from the end of each Financial Year, shall submit to Monitor a certificate as to the availability of the Required Resources for the period of 12 months commencing on the date of the certificate, in one of the following forms:

   (a) “After making enquiries the Directors of the Licensee have a reasonable expectation that the Licensee will have the Required Resources available to it after taking account distributions which might reasonably be expected to be declared or paid for the period of 12 months referred to in this certificate.”

   (b) “After making enquiries the Directors of the Licensee have a reasonable expectation, subject to what is explained below, that the Licensee will have the Required Resources available to it after taking account in particular (but without limitation) any distribution which might reasonably be expected to be declared or paid for the period of 12 months referred to in this certificate. However, they would like to draw attention to the following factors which may cast doubt on the ability of the Licensee to provide Commissioner Requested Services”.

   (c) “In the opinion of the Directors of the Licensee, the Licensee will not have the Required Resources available to it for the period of 12 months referred to in this certificate”.

4. The Licensee shall submit to Monitor with that certificate a statement of the main factors which the Directors of the Licensee have taken into account in issuing that certificate together with a working capital statement in the format required by the UK listing authority (or its successor body) from time to time for listed companies in the UK.

5. The statement submitted to Monitor in accordance with paragraph 4 shall be approved by a resolution of the board of Directors of the Licensee and signed by a Director of the Licensee pursuant to that resolution.
Section 5 – Continuity of Services

6. The Licensee shall inform Monitor immediately if the Directors of the Licensee become aware of any circumstance that causes them to no longer have the reasonable expectation referred to in the most recent certificate given under paragraph 3.

7. The Licensee shall publish each certificate provided for in paragraph 3 in such a manner as will enable any person having an interest in them to have ready access to them.

8. In this Condition:

| "distribution" | includes the payment of dividends or similar payments on share capital and the payment of interest or similar payments on public dividend capital and the repayment of capital; |
| "Financial Year" | means the period of twelve months over which the Licensee normally prepares its accounts; |
| "Required Resources" | means such: |
| | (a) management resources, |
| | (b) financial resources and financial facilities, |
| | (c) personnel, |
| | (d) physical and other assets including rights, licenses and consents relating to their use, and |
| | (e) working capital |
| | as reasonably would be regarded as sufficient to enable the Licensee at all times to provide the Commissioner Requested Services. |
Continuity of Services conditions no longer proposed following the stakeholder engagement

Restrictions on indebtedness and retention of assets

1. The Licensee shall not without the prior written consent of Monitor:
   
   (a) create or continue or permit to remain in effect any mortgage, charge, pledge, lien or other form of security or encumbrance whatsoever over any asset of the Licensee which is required for the provision of Commissioner Requested Services, or undertake any indebtedness to any other person or enter into any guarantee or obligation otherwise than:
      
      (i) on an arm’s length basis on normal commercial terms, and
      
      (ii) for the purpose of activities authorised or required by this Licence;

   (b) transfer, lease, license or lend any asset, right or benefit (including paying or lending any sum or sums) to a related undertaking of the Licensee otherwise than by way of:

      (i) a dividend or other distribution out of distributable reserves;

      (ii) repayment of capital;

      (iii) payment properly due for any goods, services or assets provided on an arm’s length basis on normal commercial terms;

      (iv) a transfer lease, licence or loan of any asset right or benefit (including a loan of any sum or sums) on an arm’s length basis on normal commercial terms and made in compliance with the payment condition referred to in paragraph 2;

      (v) repayment of or payment of interest on a loan not prohibited by sub-paragraph (a);

   provided that the provisions of Condition CoS10 below shall prevail when the circumstances in paragraph 1 of that Condition apply.

   (c) enter into an agreement or incur a commitment incorporating a cross-default obligation provided that this restriction shall not prevent the Licensee from giving any guarantee permitted by sub-paragraph (a);

   (d) continue or permit to remain in effect any agreement or commitment incorporating a cross default obligation subsisting at [1 December 2012], save that the Licensee may permit any cross-default obligation in existence at that date to remain in effect for a period not exceeding twelve months from that date, if the obligation is
solely referable to an instrument relating to the provision of a loan or other financial facilities granted prior to that date and the terms on which those facilities have been made available as subsisting on that date are not varied or otherwise made more onerous, provided that this restriction shall not prevent the Licensee from giving any guarantee permitted by sub-paragraph (a).

2. The payment condition referred to in paragraph 1(b)(iv) is that the consideration due in respect of the transaction in question is paid in full when the transaction is entered into unless either:

(a) the counterparty to the transaction has, and maintains until payment is made in full, an Investment Grade Issuer Credit Rating, or an assessment under Monitor’s Risk Rating Methodology of not less than [the equivalent of an Investment Grade Issuer Credit Rating], or

(b) the obligations of the counter-party to the transaction are fully and unconditionally guaranteed throughout the period during which any part of the consideration remains outstanding by a guarantor which has and maintains an Investment Grade Issuer Credit Rating or an assessment under Monitor’s Risk Rating Methodology of not less than [the equivalent of an Investment Grade Issuer Credit Rating].

3. The Licensee shall:

(a) not take on any new debt so that the ratio of the Licensee’s debt funding to the sum of its debt and non-debt funding expressed as a percentage will exceed [X%], and

(b) if the ratio of the Licensee’s debt funding to the sum of its debt and non-debt funding expressed as a percentage exceeds [X%], within seven days of that event occurring, submit to Monitor in writing a statement explaining how, within a period of [six months], that ratio will be reduced to below [X%] and comply with that statement.

4. In any application for consent under the provisions of this Condition the Licensee shall disclose to Monitor all material facts and information known to the Licensee.

5. In this condition:

<p>| &quot;cross default obligation&quot; | means a term of any agreement or arrangement whereby the Licensee’s liability to pay or repay any debt or other sum arises or is increased or accelerated or is capable of arising, increasing or of being accelerated by reason of a default by |</p>
<table>
<thead>
<tr>
<th><strong>Term</strong></th>
<th><strong>Definition</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>any person other than the Licensee;</td>
<td></td>
</tr>
<tr>
<td>“debt funding”</td>
<td>includes all funding which is not non-debt funding excluding credit of up to two months on goods or services purchased by the Licensee;</td>
</tr>
<tr>
<td>“Investment Grade”</td>
<td>has the same meaning as in Condition CoS4;</td>
</tr>
<tr>
<td>“Issuer Credit Rating”</td>
<td>has the same meaning as in Condition CoS4;</td>
</tr>
<tr>
<td>“the Monitor Risk Rating Methodology”</td>
<td>has the same meaning as in Condition CoS4;</td>
</tr>
<tr>
<td>“non-debt funding”</td>
<td>includes share capital, share premium reserves, accumulated profits, other reserves which may be used for the payment of dividends, and public dividend capital;</td>
</tr>
<tr>
<td>“related undertaking”</td>
<td>means an undertaking which is a subsidiary undertaking, or a parent undertaking, or a subsidiary undertaking of a parent undertaking, of the Licensee as those terms are defined in section 1162 (with Schedule 7) of the Companies Act 2006;</td>
</tr>
<tr>
<td>“taking on new debt”</td>
<td>includes entering into any arrangement to obtain debt.</td>
</tr>
</tbody>
</table>
Continuity of Services conditions no longer proposed following the stakeholder engagement

Further restrictions in the event of financial distress

1. Except with the prior consent of Monitor, the Licensee shall not enter into or complete any transaction of a type referred to in paragraph 1(b) of Condition CoS9 other than in accordance with paragraph 2 of this Condition, if:

   (a) the Licensee does not hold an Investment Grade Issuer Credit Rating or have an assessment under Monitor’s Risk Rating Methodology of not less than [the equivalent of an Investment Grade Issuer Credit Rating], or

   (b) where the Licensee holds more than one Issuer Credit Rating, one or more of the ratings so held is not Investment Grade.

2. Where paragraph 1 applies, the Licensee shall not, without the prior written consent of Monitor, transfer, lease, license or lend any asset, right or benefit (including lending or paying any sum or sums) to any related undertaking of the Licensee otherwise than by way of:

   (a) payment properly due for any goods, services or assets in relation to commitments entered into prior to the date on which the circumstances described in paragraph 1 arose and which are provided on an arm’s length basis and on normal commercial terms;

   (b) a transfer, lease, licence or loan of any, asset, right or benefit (including a loan of any sum or sums) on an arm’s length basis, and on normal commercial terms and where the value of the transaction in question is payable wholly or mainly in cash and is paid in full when the transaction is entered into; and

   (c) repayment of, or payment of interest on, a loan not prohibited by paragraph 1(a) of Condition CoS9 and which was contracted prior to the date on which the circumstances in paragraph 1 of this Condition arose, provided that such payment is not made earlier than the original date due for payment in accordance with its terms.

3. The definitions set out in Condition CoS9 apply for the purposes of this Condition.
Continuity of Services conditions no longer proposed following the stakeholder engagement

Restriction on lending and investment

1 The Licensee shall not, and shall ensure that any subsidiary undertaking of the Licensee shall not, without the consent in writing of Monitor, lend any sum or sums, or make any investments, other than by way of arrangements which are safe harbour investments made on an arm’s length basis on normal commercial terms.

2 In this condition the terms in the left hand column have the meaning set out in the right hand column, in the table below:

<table>
<thead>
<tr>
<th>“subsidiary undertaking”</th>
<th>has the same meaning as in Condition CoS9;</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Safe harbour investments”</td>
<td>are investments that fulfil the following criteria:</td>
</tr>
<tr>
<td></td>
<td>• they meet the permitted rating requirement issued by a recognised rating agency;</td>
</tr>
<tr>
<td></td>
<td>• they are held at a permitted institution;</td>
</tr>
<tr>
<td></td>
<td>• they have a defined maximum maturity date;</td>
</tr>
<tr>
<td></td>
<td>• they are denominated in sterling, with any payments / repayments of interest / principal also in sterling;</td>
</tr>
<tr>
<td></td>
<td>• they pay interest at a fixed, floating or discount rate; and</td>
</tr>
<tr>
<td></td>
<td>• they are within the preferred concentration limit.</td>
</tr>
<tr>
<td>permitted rating requirement</td>
<td>a short-term rating of at least:</td>
</tr>
<tr>
<td></td>
<td>• A-1 Standard &amp; Poor’s Ratings Group rating; or</td>
</tr>
<tr>
<td></td>
<td>• P-1 Moody’s Investors Services Inc rating; or</td>
</tr>
<tr>
<td></td>
<td>• F1 Fitch Ratings Ltd rating and/or</td>
</tr>
<tr>
<td></td>
<td>a long-term rating should be at least:</td>
</tr>
<tr>
<td></td>
<td>• A1 (Moody’s Investors Services Inc); or</td>
</tr>
<tr>
<td></td>
<td>• A+ (Standard &amp; Poor’s Ratings Group /Fitch Ratings Ltd);</td>
</tr>
<tr>
<td>recognised</td>
<td>Standard &amp; Poor’s Ratings group;</td>
</tr>
<tr>
<td>rating agency</td>
<td>Moody’s Investors Service Inc; or Fitch Ratings Ltd.</td>
</tr>
<tr>
<td>-------------------------</td>
<td>------------------------------------------------------</td>
</tr>
<tr>
<td>permitted institution</td>
<td>includes:</td>
</tr>
<tr>
<td></td>
<td>• institutions that have been granted permission, or any European institution that has been granted a passport, by the Financial Services Authority to do business with UK institutions provided they have an investment grade credit rating of A1/A+ issued by a recognised rating agency; and</td>
</tr>
<tr>
<td></td>
<td>• the UK Government, or an executive agency of the UK Government, that is legally and constitutionally part of any department of the UK Government, including the UK Debt Management Agency Deposit Facility.</td>
</tr>
<tr>
<td>defined maximum maturity date</td>
<td>before or on the date when the invested funds will be needed, subject to a maximum maturity date for all investments of 3 months.</td>
</tr>
<tr>
<td>preferred concentration limit</td>
<td>Amount to be lent or invested</td>
</tr>
<tr>
<td></td>
<td>Up to £1million</td>
</tr>
<tr>
<td></td>
<td>Over £1million</td>
</tr>
</tbody>
</table>
Section 6 – NHS Foundation Trust Conditions

Section 6 – NHS Foundation Trust Conditions

Condition FT1 – Information to update the register of NHS Foundation Trusts

1. The obligations in the following paragraphs of this Condition apply if the Licensee is an NHS Foundation Trust.

2. The Licensee shall ensure that Monitor has available to it written and electronic copies of the following documents:

   (a) the current version of Licensee’s constitution;

   (b) the Licensee’s most recently published annual accounts and any report of the auditor on them, and

   (c) the Licensee’s most recently published annual report,

and for that purpose shall provide to Monitor written and electronic copies of any document establishing or amending its constitution within 28 days of being adopted and of the documents referred to in sub-paragraphs (b) and (c) within 28 days of being published.

3. Subject to paragraph 4, the Licensee shall provide to Monitor written and electronic copies of any document that is required by Monitor for the purpose of Section 39 of the 2006 Act within 28 days of the receipt of the original document by the Licensee.

4. The obligation in paragraph 3 shall not apply to:

   (a) any document provided pursuant to paragraph 2;

   (b) any document originating from Monitor; or

   (c) any document required by law to be provided to Monitor by another person.

5. Any reference in this Condition to an electronic copy of a document is to a copy of that document in either a Microsoft Word (2003 or later) or pdf format, or in a format compatible with either of those formats, or in any other electronic format approved in writing by Monitor.

6. When submitting a document to Monitor for the purposes of this Condition, the Licensee shall provide to Monitor a short written statement describing the document and specifying its electronic format and advising Monitor that the document is being sent for
Section 6 – NHS Foundation Trust Conditions

the purpose of updating the register of NHS Foundation Trusts maintained in accordance with section 39 of the 2006 Act.
Section 6 – NHS Foundation Trust Conditions

**Condition FT2 – Payment to Monitor in respect of registration and related costs**

1. The obligations in the following paragraphs of this Condition apply if the Licensee is an NHS Foundation Trust.

2. Whenever Monitor determines in accordance with section 50 of the 2006 Act that the Licensee must pay to Monitor a fee in respect of Monitor’s exercise of its functions under sections 39 and 39A of that Act the Licensee shall pay that fee to Monitor within 28 days of the fee being notified to the Licensee by Monitor in writing.
Section 6 – NHS Foundation Trust Conditions

**Condition FT3 – Provision of information to advisory panel**

1. The obligation in the following paragraph of this Condition applies if the Licensee is an NHS Foundation Trust.

2. The Licensee shall comply with any request for information or advice made of it under Section 39A(5) of the 2006 Act.
Section 6 – NHS Foundation Trust Conditions

**Condition FT4 – NHS Foundation Trust Governance Arrangements**

1. This condition shall apply if the Licensee is an NHS foundation trust.

2. The Licensee shall apply those principles, systems and standards of good corporate governance which reasonably would be regarded as appropriate for a supplier of health care services to the NHS.

3. Without prejudice to the generality of paragraph 2 and to the generality of General Condition 5, the Licensee shall:
   
   (a) have regard to such guidance on good corporate governance as may be issued by Monitor from time to time; and
   
   (b) comply with the following paragraphs of this Condition.

4. The Licensee shall establish and implement:
   
   (a) effective board and committee structures;
   
   (b) clear responsibilities for its Board of Directors, for committees reporting to that Board and for staff reporting to that Board and those committees; and
   
   (c) clear reporting lines and accountabilities throughout its organisation.

5. The Licensee shall establish and effectively implement systems and/or processes:
   
   (a) to ensure compliance with the Licensee’s duty to operate efficiently, economically and effectively;
   
   (b) for timely and effective scrutiny and oversight by the Board of the Licensee’s operations;
   
   (c) to ensure compliance with healthcare standards binding on the Licensee including but not restricted to standards specified by the Secretary of State, the Care Quality Commission, the National Health Service Commissioning Board and statutory regulators of healthcare professions;
   
   (d) for effective financial decision-making, management and control (including but not restricted to appropriate systems and/or processes to ensure the Licensee's ability to continue as a going concern);
Section 6 – NHS Foundation Trust Conditions

(e) to obtain and disseminate accurate, comprehensive, timely and up to date information for Board and Committee decision-making;

(f) to identify and manage (including but not restricted to manage through forward plans) material risks to compliance with the Conditions of its Licence;

(g) to generate and monitor delivery of business plans (including any changes to such plans) and to receive internal and where appropriate external assurance on such plans and their delivery; and

(h) to ensure compliance with all applicable legal requirements.

6. The systems and/or processes referred to in paragraph 5 should include but not be restricted to systems and/or processes to ensure:

(a) that there is sufficient capability at Board level to provide effective organisational leadership on the quality of care provided;

(b) that the Board’s planning and decision-making processes take timely and appropriate account of quality of care considerations;

(c) the collection of accurate, comprehensive, timely and up to date information on quality of care;

(d) that the Board receives and takes into account accurate, comprehensive, timely and up to date information on quality of care;

(e) that the Licensee including its Board actively engages on quality of care with patients, staff and other relevant stakeholders and takes into account as appropriate views and information from these sources; and

(f) that there is clear accountability for quality of care throughout the Licensee’s organisation including but not restricted to systems and/or processes for escalating and resolving quality issues including escalating them to the Board where appropriate.

7. The Licensee shall ensure the existence and effective operation of systems to ensure that it has in place personnel on the Board, reporting to the Board and within the rest of the Licensee’s organisation who are sufficient in number and appropriately qualified to ensure compliance with the Conditions of this Licence.
Section 6 – NHS Foundation Trust Conditions

8. The Licensee shall submit to Monitor within three months of the end of each financial year:

(a) a corporate governance statement by and on behalf of its Board confirming compliance with this Condition as at the date of the statement and anticipated compliance with this Condition for the next financial year, specifying any risks to compliance with this Condition in the next financial year and any actions it proposes to take to manage such risks; and

(b) a statement from its auditors either:

(i) confirming that, in their view, after making reasonable enquiries, the Licensee has taken all the actions set out in its corporate governance statement applicable to the past financial year, or

(ii) setting out the areas where, in their view, after making reasonable enquiries, the Licensee has failed to take the actions set out in its corporate governance statement applicable to the past financial year.
Section 7 – Interpretation and Definitions

Section 7 – Interpretation and Definitions

Condition D1 – Interpretation and Definitions

1. In this Licence, except where the context requires otherwise, words or expressions set out in the left hand column of the following table have the meaning set out next to them in the right hand column of the table.

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>“the 2006 Act”</td>
<td>the National Heath Service Act 2006 c.41;</td>
</tr>
<tr>
<td>“the 2008 Act”</td>
<td>the Health and Social Care Act 2008 c.14;</td>
</tr>
<tr>
<td>“the 2009 Act”</td>
<td>the Health Act 2009 c.21;</td>
</tr>
<tr>
<td>“the 2012 Act”</td>
<td>the Health and Social Care Act 2012 c.7</td>
</tr>
<tr>
<td>“the Care Quality Commission”</td>
<td>the Care Quality Commission established under section 1 of the 2008 Act</td>
</tr>
<tr>
<td>“clinical commissioning group”</td>
<td>a body corporate established pursuant to section 1F and Chapter A of Part 2 of the 2006 Act;</td>
</tr>
<tr>
<td>“Commissioner Requested Service”</td>
<td>has the meaning provide in paragraph 2 of Condition G10</td>
</tr>
<tr>
<td>“Commissioners”</td>
<td>includes the NHS Commissioning Board and any clinical commissioning group;</td>
</tr>
<tr>
<td>“Director”</td>
<td>includes any person who, in any organisation, performs the functions of, or functions equivalent or similar to those of, a director of:</td>
</tr>
<tr>
<td></td>
<td>(i) an NHS foundation trust, or</td>
</tr>
<tr>
<td></td>
<td>(ii) a company constituted under the Companies Act 2006;</td>
</tr>
<tr>
<td>“the NHS Acts”</td>
<td>the 2006 Act, the 2008 Act, the 2009 Act and the 2012 Act;</td>
</tr>
<tr>
<td>“NHS Commissioning”</td>
<td>the body corporate established under section 1E of,</td>
</tr>
</tbody>
</table>
2. Any reference in this Licence to a statutory body shall be taken, unless the contrary is indicated, to be a reference also to any successor to that body.

3. Unless the context requires otherwise, words or expressions which are defined in the 2012 Act shall have the same meaning for the purpose of this Licence as they have for the purpose of that Act.

4. Any reference in the Licence to any provision of a statute, statutory instrument or other regulation is a reference, unless the context requires otherwise, to that provision as currently amended.

<table>
<thead>
<tr>
<th>Board”</th>
<th>and Schedule A1 to, the 2006 Act;</th>
</tr>
</thead>
<tbody>
<tr>
<td>“NHS Foundation Trust”</td>
<td>a public benefit corporation established pursuant to section 30 of, and Schedule 7 to, the 2006 Act.</td>
</tr>
</tbody>
</table>
Annexe Three: The Asset Register

In this annexe we set out our current thinking on how the asset register might work. At this time, this is for information - we will consult on our formal guidance on this topic later in the year.

The asset register

Under the current system, NHS foundation trusts are not allowed to dispose of any land and buildings required to provide mandatory services. We are proposing to place a similar restriction on such assets used in the provision of CRS, broadened slightly to encompass other ‘relevant’ assets.

Licensees themselves will be responsible for determining which assets should be deemed relevant and placed on the register. The assets we would expect licensees to include on the register are those whose loss would quickly and materially inhibit the provision of the CRS. It is therefore likely that the asset register would include those assets which could not be replaced within a reasonable timescale. But it is not our intention to be overly prescriptive about the assets that should be included, since the assets critical to CRS provision will vary across the sector. Instead, we expect each licensee to develop a policy appropriate to their organisation which identifies those assets actively involved in the provision of the services that have been classified as CRS.

In this context, our current view is that it should be for licensees to determine their own materiality thresholds. However, we would expect to see reasonable justifications for chosen thresholds. It may also be sensible for Monitor to denote specific exemptions or generic value thresholds for particular assets. Over time, and as more information becomes available, we may publish best practice guidelines showing how licensees have interpreted the definition of a relevant asset.

We consider that our proposed regulatory approach is proportionate in placing the emphasis on licensees being transparent in the way they identify assets that are critical to the provision of CRS. However, as part of our enforcement regime, in the event of a provider of CRS getting into financial difficulties, we would retain the option to increase our requirements for and scrutiny of a licensee’s asset register. For instance, this might be required if a licensee breaches Continuity of Services condition 2, 4 or 8.

Example

Assets such as land and buildings would normally be included on the asset register as it is likely to be a difficult and lengthy process to replace them. They would only be excluded from the asset register if their disposal would in no way materially affect the provision of CRS. A similar principle would apply to equipment which is high value and/or specification, such as scanners or other specialist equipment. We would not expect to see on the asset register items which could be replaced quickly and easily, for example clinical consumables or office furniture, as their disposal would not materially impact on the provision of CRS.

Process for approving disposals

If a licensee wishes to dispose of assets on the register, it would have to seek permission from Monitor and provide us with any additional information we may need to make a decision. However,
asset disposals that are required by the Care Quality Commission on safety grounds would not need our approval.

We envisage that the grounds on which we would withhold approval will be restricted to cases where we believe the disposal would lead the provider to be in breach of another licence condition, or would make such a breach likely in the foreseeable future. As noted earlier, we will be considering this matter further and consulting on formal guidance on this topic later in the year. However, our initial thoughts on how the process might work in different situations are set out below.

- The process of gaining Monitor approval for the like-for-like replacement of assets or upgrades will be very straightforward. One option would be for Monitor to issue a general consent for like-for-like replacements or upgrades and to not require licensees to inform Monitor of their intention to dispose of these assets. This general consent would be subject to conditions, for example, on what constitutes ‘like-for-like’. Where it became clear that a licensee had breached these conditions and disposed of a relevant asset without replacing it on a like-for-like basis, then the licensee would risk being found in breach of its licence.

- In cases where licensees intend to dispose of relevant assets and not replace them, or to downgrade relevant assets, the provider would need to notify Monitor and secure approval for the action, subject to any general conditions that Monitor may have issued or requirements the CQC may have placed on the provider. Monitor would carefully consider each request and reply to the licensee within 28 calendar days.

- In the situation where relevant assets are being disposed of as part of a service reconfiguration, licensees would need to notify Monitor of the proposed change to the way in which the CRS was being provided, as required by Continuity of Services condition 1. Monitor would then require notification that a change to the designation of relevant assets is sought and, depending on approval of the change under Continuity of Services condition 1, permission to amend the asset register would be given automatically.