

# Monitor

Making the health sector  
work for patients

In association with:  
Care Quality Commission  
Department of Health  
Foundation Trust Governors' Association  
Foundation Trust Network

## Your duties: a brief guide for NHS foundation trust governors



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## What is this guide and who is it for?

This document is a brief guide to introduce your core duties as the governor of a National Health Service (NHS) foundation trust. It is provided as a more accessible summary of 'Your statutory duties: A reference guide for NHS foundation trust governors', which you can refer to for further detail on any point.

It describes governors' "statutory" duties, meaning those you are required to carry out by law. It also outlines what governors can expect from the regulatory framework.

The guide is intended as an easy reference point on core parts of the governor role for:

- current governors (both those with experience and those new to the role)
- those who are thinking about standing for election
- other interested audiences such as patients and the public, NHS foundation trust leadership teams and staff, other NHS bodies, MPs and the media.

## Some important organisations for governors

Following the Health and Social Care Act 2012, the NHS changed its structures and processes to more clearly put patients first, by focusing on improved quality and outcomes. NHS foundation trusts – and their governors – now interact with a range of organisations with new or changed roles.

### Monitor

Monitor is the sector regulator for health services in England. Its job is to protect and promote the interests of patients by ensuring that the whole sector works for their benefit.

For example, Monitor makes sure foundation hospitals, ambulance trusts and mental health and community care organisations are well led and are run efficiently, so they can continue delivering good quality services for patients in the future. To do this, it works particularly closely with the Care Quality Commission (CQC), the quality and safety regulator. When the CQC establishes that an NHS foundation trust is failing to provide good quality care, Monitor takes remedial action to ensure the problem is fixed.

Monitor also sets prices for NHS-funded services, tackles anti-competitive practices that are against the interests of patients, helps commissioners ensure essential local services continue if providers get into serious difficulty and enables better integration of care so services are less fragmented and easier to access.

### Care Quality Commission

The CQC is the independent regulator of health and adult social care in England. Its purpose is to make sure health and social care services provide people with safe, effective, compassionate, high quality care and to encourage care services to improve. The CQC's role is to monitor, inspect and regulate services to make sure

they meet fundamental standards of quality and safety and to publish what it finds, including performance ratings to help people choose care.

The CQC will ask the following questions when it inspects services:

- Are they safe?
- Are they effective?
- Are they caring?
- Are they well led?
- Are they responsive to people's needs?

The CQC's principles are to:

- put people who use services at the centre of our work
- be independent, rigorous, fair and consistent
- have an open and accessible culture
- work in partnership across the health and social care system
- be committed to being a high performing organisation and apply the same standards of continuous improvement to ourselves that we expect of others and
- promote equality, diversity and human rights.

The CQC regulates:

- treatment, care and support provided by hospitals, GPs, dentists, ambulances, community and mental health services
- treatment, care and support services for adults in care homes and in people's own homes (both personal and nursing care)
- services for people whose rights are restricted under the Mental Health Act.

#### **A changed healthcare landscape**

The way the NHS plans and buys services has changed following the Health and Social Care Act 2012, with 214 clinical commissioning groups (CCGs) taking on the role of primary care trusts locally.

Health and wellbeing boards (HWB) are where CCGs and local authorities come together to strategically plan and integrate health and social care in an area. Each HWB has a representative of the local HealthWatch (a consumer champion) as a member.

There are a large number of organisations seeking to maintain and improve the performance of the healthcare sector, each with discrete roles. These include the boards of the healthcare providers (eg hospitals, mental health, community and ambulance services), Monitor, the CQC, NHS England and CCGs, as well as Royal Colleges, the National Institute for Health and Care Excellence (NICE) and the General Medical Council (GMC). They all share the same goal: to make sure people get the best possible care and service from the NHS, in line with the principles and values of the NHS Constitution.<sup>1</sup>

## What is an NHS foundation trust?

NHS foundation trusts are different from NHS trusts; they have a unique legal form known as “public benefit corporations”. NHS foundation trusts provide healthcare services for patients and service users in England. Unlike NHS trusts, they are free from central government control and can manage their own affairs and make their own decisions, including whether to make and invest surpluses. However, they remain subject to legal requirements and have a duty to exercise their functions “effectively, efficiently and economically”.<sup>2</sup>

Each NHS foundation trust sets out its governance structure in its constitution. There are legislative requirements concerning the governance of all NHS foundation trusts. For example, all NHS foundation trusts have:

- members
- a council of governors
- a board of directors.

We explain these further below.

Please note, in this document where we use the word “board”, it refers to the board of directors; where we use “council” it refers to the council of governors.

### Members

Members of the public and staff who work at an NHS foundation trust can be “members” of the trust. In addition, NHS foundation trusts may opt to have a category of members who are either patients/service users and/or their carers. Members vote to elect governors and can also stand for election themselves.

### Council of governors

The council of governors is made up of elected and appointed governors. Governors are volunteers and are not paid.

Elected governors are elected by distinct constituencies:

- public governors are elected by members of the public constituency

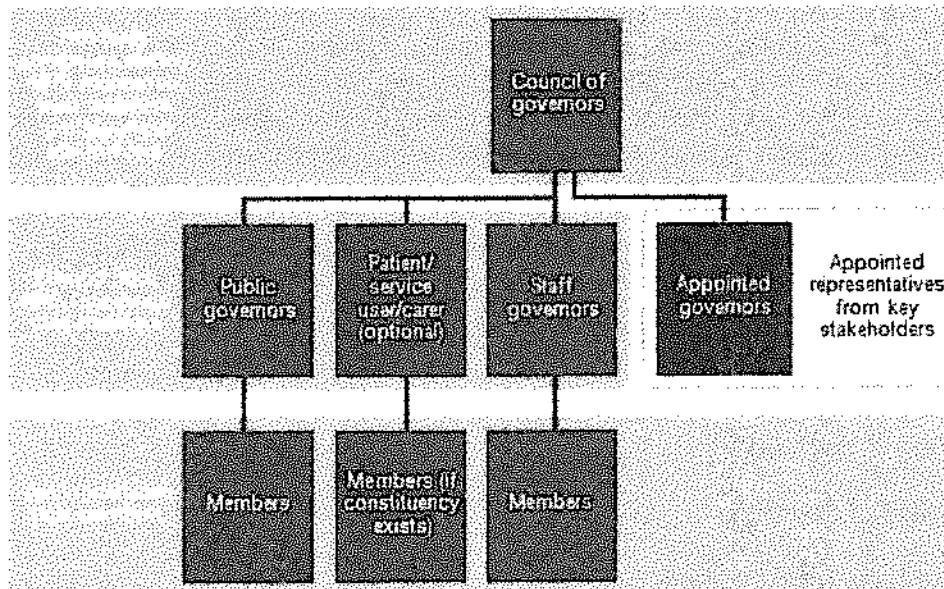
<sup>1</sup> <https://www.gov.uk/government/publications/the-nhs-constitution-for-england>

<sup>2</sup> National Health Service Act 2006, Chapter 5, s.63.

- staff governors are elected from the staff body and
- patient, carer or service user governors are elected by members who are patients/service users and/or their carers.

Appointed governors represent stakeholder organisations such as the local council or local charities. If the foundation trust wants governors appointed by an external organisation, this must be specified in the constitution. The structure of the council of governors is shown in the diagram below.

Figure 1: The structure of the council of governors



Governors are not directors. The governors' duty to "hold the non-executive directors, individually and collectively, to account for the performance of the board of directors" does **not** mean that governors are responsible for decisions taken by the board of directors on behalf of the NHS foundation trust. Responsibility for those decisions remains with the board of directors, acting on behalf of the trust. This is covered more fully in the [full guide to your statutory duties](#).

### Board of directors

The board of directors is made up of executive directors and non-executive directors. The executive directors are employees, are led by the chief executive and are responsible for the day to day management of the foundation trust. Foundation trust boards must also include the following executive directors: a finance director, a director who is a registered doctor, a director who is a registered nurse or a registered midwife.

The non-executive directors are not employees. They bring an independent perspective to the board meeting and have a particular duty to challenge decisions and proposals made by executive directors. The board is led by the chair who is also a non-executive director. The board will also have a deputy chair and a senior independent director (SID).

The board's overall duty is to ensure the provision of safe and effective services for members and for the public. The board does this through the governance of the foundation trust. Governance is the process by which boards lead and direct their organisation. This process includes setting the corporate strategy, setting organisational values and culture, and supervising the work of the executive directors. The board will reserve certain key decisions to itself but will delegate many decisions either to executive directors or to committees of the board. The board also has a duty to be accountable to governors, to regulators and to key stakeholders such as commissioners.

(The role and responsibilities of the board are covered in more detail on page 12 of the [full guide to your statutory duties](#).)

### The dual role of the chair

The chair of the board of directors is also the chair of the council of governors. They are responsible for ensuring that the board and council work effectively together and that they receive the information they need to undertake their respective duties.

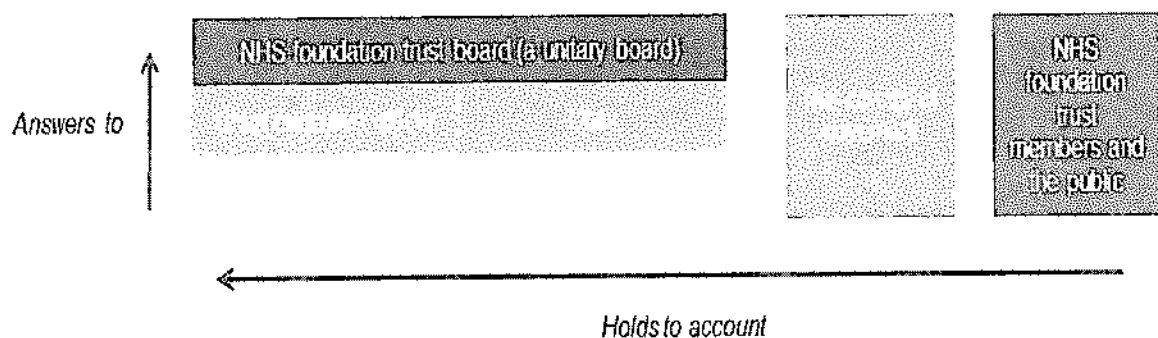
It is important that the board of directors and council of governors see their interaction as being one of constructive partnership and seeking to work effectively together.

### Committees

NHS foundation trusts use board committees to make decisions in key business areas that might be delegated and to help the board obtain the assurances it needs. The trust is required by law to have board committees in place to make decisions on appointments, remuneration and matters relating to audits. The trust may also decide to have other committees and working groups, including governor committees and groups, but these are not compulsory.

A trust's "chain of accountability" – including the position of the council of governors – is shown below.

Figure 2: NHS foundation trust "chain of accountability"



## What does a governor do?

Governors have an important role in making an NHS foundation trust publicly accountable for the services it provides. They bring valuable perspectives and contributions to its activities. Importantly, as a governor you will hold non-executive directors to account for the performance of the board and represent the interests of NHS foundation trust members and the public. These duties are explained further below.

The over-riding role of the council of governors is to hold the non-executive directors individually and collectively to account for the performance of the board of directors and to represent the interests of NHS foundation trust members and of the public.

### Holding non-executive directors to account for performance of the board

There is no one “right way” to hold non-executive directors to account and local approaches are emerging. It could be done by exercising the other required duties outlined in more detail below. For example:

- appointing or removing the chair, non-executive directors or auditors
- questioning non-executive directors on how the board is delivering on the goals identified in the forward plan
- inviting members of the board to meetings of the council of governors to answer questions.

The [full guide to your statutory duties](#) (see Table 2 on page 27) outlines the governors' role in holding non-executives to account in more detail.

### Representing the interests of members and the public

Governors are required by law to represent the interests of both members of the NHS foundation trust and of the public. They may choose a range of different ways to engage with these groups. We are aware of a number of methods that some councils of governors have chosen to adopt – and which you may wish to consider – such as governor “drop-in days” where members and the public can come and meet governors, or surveys.

### Other specific governor duties

Here we list all the specific duties in which governors have a role; for further explanation see the [full guide to your statutory duties](#).



### Amending the constitution

NHS foundation trusts working with governors have the power to amend their constitutions. Any changes made to the constitution of a NHS foundation trust must be:

- consistent with schedule 7<sup>3</sup> of the National Health Service Act 2006 (which outlines the minimum requirements for the constitution of an NHS foundation trust)<sup>4</sup>
- approved by both more than half the council of governors and more than half the directors who are present at the vote.

### Approving the appointment of the chief executive

The non-executive directors, including the chair, are responsible for appointing or removing the NHS foundation trust's chief executive. The council of governors can decide whether or not to approve the appointment of the chief executive.

### Appointing and removing the chair and other non-executive directors

It is for the council of governors at a general meeting of the council to appoint or remove the chair and the other non-executive directors. As well as appointment and removal powers, governors also decide the remuneration, allowances and other terms and conditions for the chair and non-executive directors, working with the appointments<sup>5</sup> and remuneration committees. However, if there is a breach of the conditions of the trust's licence, Monitor may need to exercise its statutory powers to suspend or remove a chair or other non-executive director. Under such circumstances, Monitor's statutory powers take precedence over the powers that may be exercised by the council of governors.

### Appointing and removing the NHS foundation trust's external auditor

This duty will be carried out at a general meeting of the council of governors, after they have received a report from the Audit Committee on the matter. When appointing or removing the NHS foundation trust's external auditor, governors must consider the criteria for auditors set out in 'Audit Code for NHS Foundation Trusts'. The process is covered in more detail in the statutory guide.

### Receiving the NHS foundation trust's annual accounts and annual report

Governors must be presented with the NHS foundation trust's annual accounts, any report of the auditor on them and the annual report at a general meeting of the council. The presentation of the annual report and accounts to the council of governors is a good opportunity for the board of directors to brief the council of governors on the overall performance of the trust in the previous year. The council of governors should provide feedback to the board of directors based on its view of the

<sup>3</sup> [www.legislation.gov.uk/ukpga/2006/41/schedule/7](http://www.legislation.gov.uk/ukpga/2006/41/schedule/7)

<sup>4</sup> For support in understanding the relevant Acts of Parliament, please ask your trust's board secretary in the first instance.

<sup>5</sup> Appointments committees can also be known as nomination committees.

overall performance of the board. Governors cannot change the content of the reports. To aid the feedback process, Monitor's NHS Foundation Trust Annual Reporting Manual (updated annually) sets out requirements for the content of these documents and includes both quality and financial aspects.

#### Preparing the forward plan

Preparation of the trust's forward plan is led by the board, but the law requires the board of directors to have regard to the view of the council of governors. To present an informed and representative view, governors should canvass the views of members and the public and feed back their views to the board of directors.

#### Taking decisions on significant transactions

Governors have a range of decision-making responsibilities on "significant transactions", mergers, acquisitions, separations and dissolutions. These are all explained further in the [full guide to your statutory duties](#).

In brief, **more than half of the council of governors present and voting at a meeting** can approve significant transactions locally (the definition of "significant" is set out in the constitution or the constitution will state that there is no local definition, but could include financial thresholds or changes to the nature of the business, such as taking on community services). For mergers, acquisitions, separations and dissolutions, **more than half of all governors, not just half the number that attends the meeting at which the decision is taken**, must approve the decision.

Following a merger with another NHS foundation trust (whose council of governors must also approve the transaction), both the respective councils of governors would be dissolved, and one new council of governors would be established.

Following an acquisition of an NHS foundation trust by another NHS foundation trust, the council of governors of the acquiring trust may remain in place. The acquiring NHS foundation trust is likely to extend its public constituency areas to cover the areas served by the acquired NHS foundation trust and new governors will need to be elected to represent these additional public constituency areas.

#### Taking decisions on non-NHS income

The principal purpose of an NHS foundation trust is to provide goods and services for the health service in England; income from these goods and services must always exceed the income from non-NHS sources. Governors have to approve any change to the proportion of income derived from non-NHS sources by deciding whether they believe the change would interfere, to any significant extent, with fulfilling the trust's principal purpose or its other functions.

If the board of an NHS foundation trust proposes to increase its non-NHS income by 5% or more in any one year (for example from 2% of income to 7%) then **more than half the governors voting at the meeting** must approve the proposal before it can take effect. This change would normally be signalled in the forward plan. It is possible that a change in non-NHS activities (such as an investment) could be subject to the provisions on significant transactions, outlined above.

### What is a lead governor?

The lead governor is the main point of contact in a few specific circumstances in which Monitor may need to contact the council of governors or the other way round (see 'How governors will normally work with Monitor', below). Trust secretaries will usually disseminate communications from Monitor to governors. Some trusts choose to broaden the role of the lead governor (although this is not compulsory); some also choose deputy lead governors too. Where the role is broadened, the directors and governors should seek to agree a description of the role. Directors should not be involved in the choice of lead governor however – that is for the governors to decide.

### What does the senior independent director do?

In consultation with the council of governors, the board appoints one of the non-executive directors as the senior independent director. They are an alternative point of contact for governors (and directors) when:

- they have concerns that have not been resolved through normal channels
- contact with the chair, finance director or chief executive is inappropriate
- discussing the chair's performance appraisal, remuneration or allowances.

### What is the Panel for Advising Governors?

"The Panel" is both independent and national. Its role is to answer questions raised by the governors of an NHS foundation trust about whether the trust has failed or is failing to act in accordance with either:

- its own constitution or
- Chapter 5 of the NHS Act 2006 (which sets out how NHS foundation trusts operate and therefore the Panel also answers questions around healthcare standards).

A governor may refer a question to the Panel only if **more than half the members of the council of governors voting** approve the referral. Evidence of the vote will need to be provided to the Panel before it can consider a question from governors. The Panel's remit is to support governors in fulfilling their role in representing the interests of their members and the public. Best interests are served by governors seeking to resolve any questions or issues with their trust chair and other non-executive directors before posing a question to the Panel. However, the Panel is available as a free resource in the event of continued uncertainty.

## How governors will normally work with Monitor

When appropriate, Monitor will interact with the council of governors through the lead governor. There are three main points where this would normally happen:

1. On appointment of the lead governor

Monitor staff, typically senior regional managers, will introduce themselves to the lead governor (usually in a telephone call), in the same way as they might with a new chair or chief executive.

2. During business as usual

In "business as usual" circumstances, the board and council of governors of an NHS foundation trust will manage their own relationship, though Monitor representatives might meet a small number of governors or the lead governor during the annual visit if it was felt appropriate – for example, to maintain communication.

3. If there is planned or actual regulatory action

Monitor will contact the lead governor if any action is planned. For example, Monitor may telephone the lead governor or write on the launch of an investigation, inviting comments, and again on conclusion of the investigation with likely recommendations. If a trust is found to be in breach of its licence to provide healthcare services, governors may wish to arrange to meet Monitor to hear its concerns and its expectations of the trust. Certainly, lead governors should feel able to contact Monitor where concerns arise while the trust is in breach.

Full detail of how Monitor manages interventions is described in its 'Risk Assessment Framework' and the 'Enforcement Guidance'.

A diagram outlining the full range of actions that Monitor may take to fulfil its core responsibilities appears on page 7 of the full guide to your statutory duties.

### Further information and useful contacts

The full guide provides sources of further information but some important sources of support are:

Care Quality Commission	<a href="http://www.cqc.org.uk">www.cqc.org.uk</a>
Foundation Trust Governors' Association	<a href="http://www.ftga.org.uk">www.ftga.org.uk</a>
Foundation Trust Network	<a href="http://www.foundationtrustnetwork.org">www.foundationtrustnetwork.org</a>
Monitor	<a href="http://www.monitor.gov.uk">www.monitor.gov.uk</a>
Panel for Advising Governors	<a href="http://www.monitor.gov.uk/governorpanel">www.monitor.gov.uk/governorpanel</a>

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Making the health sector  
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# Your statutory duties

## A reference guide for NHS foundation trust governors

**August 2013**

This guide was first published by Monitor in October 2009. This updated version reflects the new roles and responsibilities of governors as set out in the Health and Social Care Act 2012.

In association with:



Department  
of Health



Foundation Trust  
Governors' Association  
[www.ftga.org.uk](http://www.ftga.org.uk)



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## About this guide

This guide lays out the statutory duties for governors of NHS foundation trusts, as provided by the National Health Service Act 2006 (the 2006 Act) and amended by the 2012 Act. It is written for governors (rather than trust boards more widely) and is advisory only – this means there is no requirement to “comply or explain” (ie, to comply with the guidance or explain reasons for non-compliance).

When Parliament created NHS foundation trusts, it gave them independence from central government and a governance structure designed to ensure that people from the communities served by the trusts can take part in governing them. NHS foundation trust governors are the direct representatives of local communities. Governors do not manage the operations of the trusts; rather, they challenge the board of directors and hold the non-executive directors to account for the performance of the board. Governors also represent the interests of NHS foundation trust members and the public, and provide them with information on the trust’s performance and forward plan.

We recognise the variety of non-statutory duties that governors may perform, as well as the importance of preserving the autonomy of individual trusts. While this guide is limited to commenting on the statutory duties common to all governors, it provides links to other bodies and resources that can support governors in any non-statutory duties they may take on at their NHS foundation trust. It does not seek to prescribe how governors should work day-to-day; NHS foundation trust boards and governors will agree this between themselves.



## Chapter 1: Background information

*This chapter provides background information for governors. It covers:*

- *the main changes to the NHS following the Health and Social Care Act 2012;*
- *how the main health care organisations are working together for patients;*
- *the regulation of NHS foundation trusts; and*
- *what this guidance document contains.*

### 1.1 Summary of changes to the NHS introduced by the Health and Social Care Act 2012

#### Monitor's role

Under the Health and Social Care Act 2012 (the 2012 Act), Monitor is the sector regulator of health services in England. Our job is to protect and promote the interests of patients by ensuring that the whole sector works for their benefit. We do this by promoting the provision of services which is effective, efficient and economic, and which maintains or improves their quality. For further details please see our website: [www.monitor.gov.uk](http://www.monitor.gov.uk).

On 1 April 2013 Monitor's provider licence became the main tool with which we regulate providers of NHS services. The licence applies to all NHS foundation trusts. From 1 April 2014 it will also apply to other eligible providers of NHS services. It sets out a range of conditions that providers must meet so that they play their part in continually improving the effectiveness and efficiency of NHS health care services to meet the needs of patients and taxpayers, today and in the future. The licence allows Monitor to fulfil its new duties to:

- set prices for NHS-funded care in partnership with NHS England;
- enable integrated care;
- safeguard choice and prevent anti-competitive behaviour that is against the interests of patients; and
- support commissioners to protect essential health care services for patients if a provider gets into financial difficulties.

Monitor will continue to ensure that the boards of directors of NHS foundation trusts focus on good leadership and governance. In addition, we will continue to assess the remaining NHS trusts for NHS foundation trust status.

#### Other changes

The 2012 Act:

- gives a renewed focus on improving quality and outcomes;
- focuses on integrated care by setting out duties for Monitor, the Care Quality Commission (CQC), NHS England, Clinical Commissioning Groups (CCGs) and Health and Wellbeing Boards (HWBs);
- transfers power to front-line doctors and nurses;
- strengthens public health by giving responsibility for local public health services to local authorities;
- gives patients more choice and information on how the NHS is performing;

- strengthens local democratic involvement by ensuring that there is at least one locally elected representative and a representative of local Healthwatch on every HWB, to influence and challenge commissioning decisions and promote integrated working on care; and
- abolishes strategic health authorities and primary care trusts (PCTs). From April 2013, PCTs have been replaced by CCGs. These are formed by GP practices and are responsible for commissioning the majority of health care services for local populations.

## 1.2 Working together for patients

There are a number of organisations involved in the regulation of health care. While the roles of Monitor, the CQC, the National Institute for Health and Care Excellence (NICE), NHS England and the NHS Trust Development Authority (NHS TDA) may be different, ultimately our goal is the same: to ensure people get the best possible care and service from the NHS.

We work closely together because we can do a better job for people that way. The needs of patients and communities are more important than the boundaries between our organisations.

We all put patients first. We work hard to give people the information they need to make choices about their own care if they want to, and to help doctors and nurses (and other clinicians and health professionals) to deliver the best results for them.

We all use hard evidence to make the best possible decisions in patients' interests – decisions which drive improved quality and safety while making the best use of valuable public money so that it can stretch even further.

In line with the principles and values set out in the *NHS Constitution*, together we aim to ensure that the people who use NHS services, the organisations which provide them and the commissioners who buy them are able to focus on the quality, safety and viability of the services people depend on in times of need.

### Third parties with roles in relation to NHS foundation trusts

Bodies with statutory enforcement powers specific to health care include:

- the CQC; and
- regulators of individual health professionals, such as the Royal College of Surgeons, the General Medical Council.

Bodies which will interact with NHS foundation trusts and may request information from them – but have no enforcement powers over them – include:

- commissioners, such as CCGs;
- HWBs;
- overview and scrutiny committees of local authorities; and
- local Healthwatch organisations and Healthwatch England.

The Glossary within this document provides information about who these organisations are and what they do.

NHS foundation trusts are not generally subject to direction by the Secretary of State for Health. This is one of the key distinctions between NHS foundation trusts and NHS trusts.

### **1.3 Regulation of NHS foundation trusts**

Monitor assesses and authorises NHS trusts for NHS foundation trust status. We assess whether NHS foundation trusts are well led (from both a quality and finance perspective) and financially robust enough to deliver excellent care and value for money. The CQC registers all care providers in England that meet its standards of quality and safety, including NHS foundation trusts, and monitors that they continue to meet the standards on an ongoing basis.

#### **Assessment of applicant NHS trusts**

Monitor continues to receive and consider applications from NHS trusts that are seeking to obtain NHS foundation trust status. When we are satisfied that an applicant NHS trust meets certain criteria, we authorise NHS foundation trust status.

From 1 April 2013, as part of the authorisation process, Monitor issues successful applicants with an authorisation and with a licence that sets out various conditions under which an NHS foundation trust is required to operate. Each NHS foundation trust's authorisation and licence are published on [Monitor's website](#). We will only authorise and license providers that are registered with the CQC. NHS foundation trusts authorised before 1 April 2013 have been automatically issued with a licence which replaces the Terms of Authorisation.

#### **Compliance and oversight of NHS foundation trusts**

Monitor oversees an NHS foundation trust's compliance with its licence conditions. The licence conditions set out the requirements placed on NHS foundation trusts. They are the same for every NHS foundation trust, although we may add specific licence conditions to address any governance issues that undermine compliance with the licence. Governors should familiarise themselves with their trust's licence conditions because these set out the terms under which the trust must operate.

The standard licence conditions are grouped into seven sections. The first section, containing the General Conditions, sets out standard requirements and rules for all licence holders. Sections 2 to 5 are about our new functions: setting prices; enabling services to be provided in an integrated way; safeguarding choice and preventing anti-competitive behaviours; and supporting commissioners to maintain service continuity. Section 6 looks at specific conditions for NHS foundation trusts and Section 7 contains definitions and notes.

Monitor will collect information from NHS foundation trusts to assess their compliance with their Governance and Continuity of Services licence conditions, typically through annual and quarterly monitoring. However, we may require monthly reports if we have concerns about the trust and, by exception, further information for material financial events, such as transactions of material adverse changes in an NHS foundation trust's financial situation.

We will also use reports from third parties, such as the CQC, to inform our decisions on whether an NHS foundation trust is well run on behalf of patients. Monitor and the CQC share information and work closely together to deal with trusts in difficulty, and meet regularly to ensure each has the relevant information from the other when working with NHS foundation trusts on quality of care.

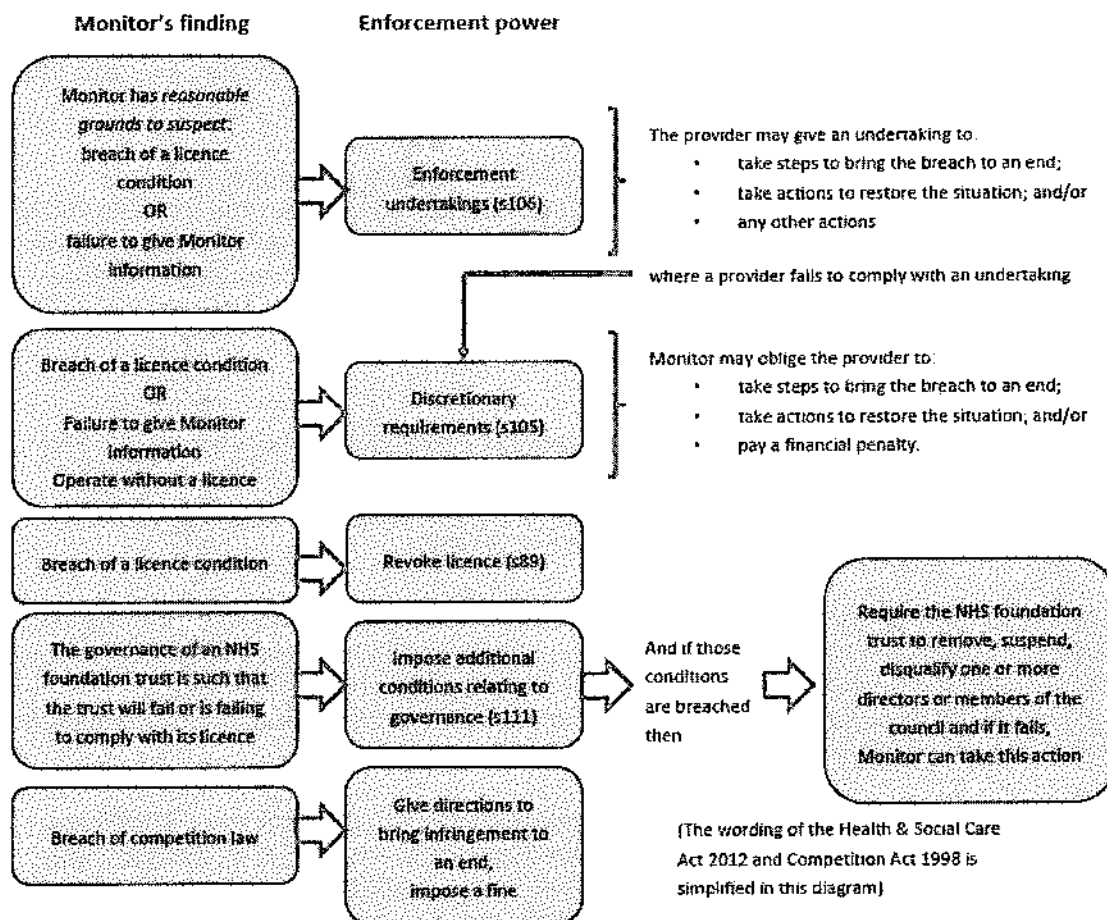
Monitor's *Enforcement Guidance* sets out how we might formally investigate potential breaches of the licence conditions, the processes we are likely to follow, and the factors we may consider when deciding what requirements to impose in the event of a breach. We can use our statutory powers to take action where an NHS foundation trust has breached or is breaching its licence.

Enforcement action can include:

- Discretionary requirements. Monitor may require NHS foundation trusts in breach of a condition of the licence to do one or more of the following: pay a fine of up to 10% of their turnover in England; take specific steps to make sure that the breach does not continue or recur; or make good the impact of the breach.
- Enforcement undertakings. Monitor may accept an enforcement undertaking to make sure that the breach does not continue or recur; make good the impact of any breach; or take action (including paying a sum of money) to benefit any other licence holder affected by the breach, or any commissioner of health care services for the purposes of the NHS affected by the breach.
- Imposition of licence conditions on NHS foundation trusts. If Monitor considers that an NHS foundation trust is failing, or will fail, to comply with its licence as a result of poor governance, we may include in the licence additional conditions relating to governance. Where we are satisfied that an NHS foundation trust has breached, or is breaching, an additional licence condition, we may require the trust to: remove a director or governor, and appoint an interim director or governor; suspend a director or governor from office for a specified period; and/or disqualify a director or governor from holding office as a director or governor for a specified period.

Monitor will apply a prioritisation framework to decisions about whether to pursue enforcement action and to all other significant cases where we have discretion over whether to act. When assessing the scale and scope of the breach and priorities for action, we expect to draw on a range of information. This might include, but is not limited to: information that we collect directly; information from patient representative bodies and commissioners; any complaints and representations made to us; and information from providers themselves, including, for example, monitoring information.

Figure 1: Overview of Monitor's formal provider enforcement powers (simplified)



Although our enforcement powers will only be used where an NHS foundation trust fails, or in some cases is likely to fail, to comply with its licence, all governors should be aware that these powers exist. In the first instance, however, it is the role of governors to hold the non-executive directors, individually and collectively, to account for the performance of the board of directors.

As this guide explains, the council of governors has its own powers to intervene where its trust's performance is not acceptable, for example because it breaches the *Compliance Framework*.<sup>1</sup> The council of governors can ultimately remove the chair and/or the non-executive directors of its trust if its performance deteriorates and remedial actions taken by the board are insufficient. These particular powers of the council of governors are described more fully in Chapter 5 of this guide and are unchanged by the 2012 Act.

Where Monitor is satisfied that an NHS foundation trust is, or is likely to become, unable to pay its debts, we may make an order authorising the appointment of a Trust Special Administrator (TSA) in order to ensure the continued provision of key services from the

<sup>1</sup> From 1 October 2013 Monitor's *Compliance Framework* will be replaced with our *Risk Assessment Framework*, which will be available on our website.

failing trust. The TSA will take on the role of the trust's governors, chairman and executive and non-executive directors; the existing post holders would be suspended from office.

## Chapter 2: The governance structure of NHS foundation trusts

*This chapter describes the role of the council of governors within the overall structure of an NHS foundation trust. It covers:*

- *the definition of NHS foundation trusts; and*
- *the governance structure of NHS foundation trusts.*

### 2.1 What are NHS foundation trusts?

NHS foundation trusts are public benefit corporations that are authorised, under the 2006 Act, to provide goods and services for the purposes of the health service in England. They are part of the NHS and provide over half of all NHS hospital, mental health and ambulance services. They provide health care in line with the core NHS principles: that care should be universal, comprehensive and free at the point of need.

NHS foundation trusts were originally created under the Health and Social Care (Community Health and Standards) Act 2003. They are free from central government control. This means they have the freedom to make their own decisions, including whether to make and invest surpluses, and to manage their own affairs. However, they are subject to statutory requirements and all have a duty to exercise their functions effectively, efficiently and economically.

### 2.2 What is the governance structure of an NHS foundation trust?

Each NHS foundation trust has its own governance structure, set out in its constitution. Each trust's constitution is published in the [NHS foundation trust directory](#) on Monitor's website.

#### **NHS foundation trust governing documents**

##### *NHS foundation trust constitutions*

Every NHS foundation trust has its own constitution which defines how the trust's governance operates. Governors should refer to this to understand the particular arrangements of their trust, including its structures and procedures, to enable them to fulfil their statutory duties. Changes to the trust's constitution can take effect only if the amendments are approved by **both**: i) more than half of the members of the board of directors of the trust voting; and ii) more than half of the members of the council of governors of the trust voting.

Any proposed amendments must also meet the requirements of Schedule 7 of the 2006 Act. NHS foundation trusts themselves must ensure this is the case as Monitor no longer has a power or duty to determine this, and we have no role in approving constitution amendments. An amendment will have no effect if the constitution would, as a result, not accord with Schedule 7 of the 2006 Act. Monitor must be notified of any amendments made to an NHS foundation trust's constitution so that a current version can be uploaded to the NHS foundation trust directory on Monitor's website.

### NHS Foundation Trust Code of Governance

In addition to the formal statutory requirements, Monitor has also issued good practice advice on governance in *The NHS Foundation Trust Code of Governance (Code of Governance)*. The *Code of Governance* operates on a "comply or explain" basis, meaning that NHS foundation trusts must either comply with its requirements or explain why they have not. This guide complements the *Code of Governance*.<sup>2</sup>

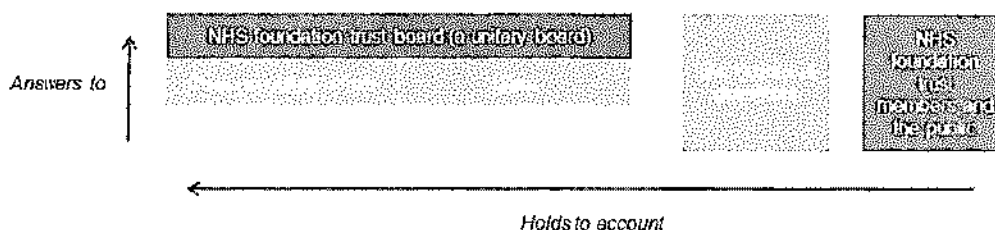
### NHS foundation trust governance structure

The basic governance structure of all NHS foundation trusts includes:

- membership;
- council of governors; and
- board of directors.

In addition to this basic structure, trusts also make use of board committees (usually comprising directors only) and working groups, some of which may comprise both governors and directors, as a practical way of dealing with specific issues. Some board committees (appointments, audit and remuneration) are required by legislation and others may vary between trusts.

**Figure 2: Chain of accountability in NHS foundation trusts**



### Membership

The membership of an NHS foundation trust consists of staff members, the general public and, sometimes, patients or service users and/or their carers. Members belong to various constituencies as defined in each trust's constitution. A trust must have a public constituency and a staff constituency, and may also have a patient, carer and/or service user constituency if the constitution allows for this. Patient, service user and carer constituencies are not compulsory but may help to ensure that the people who use the trust's services are appropriately represented. Members in the various constituencies vote to elect governors and can also stand for election themselves.

### Council of governors

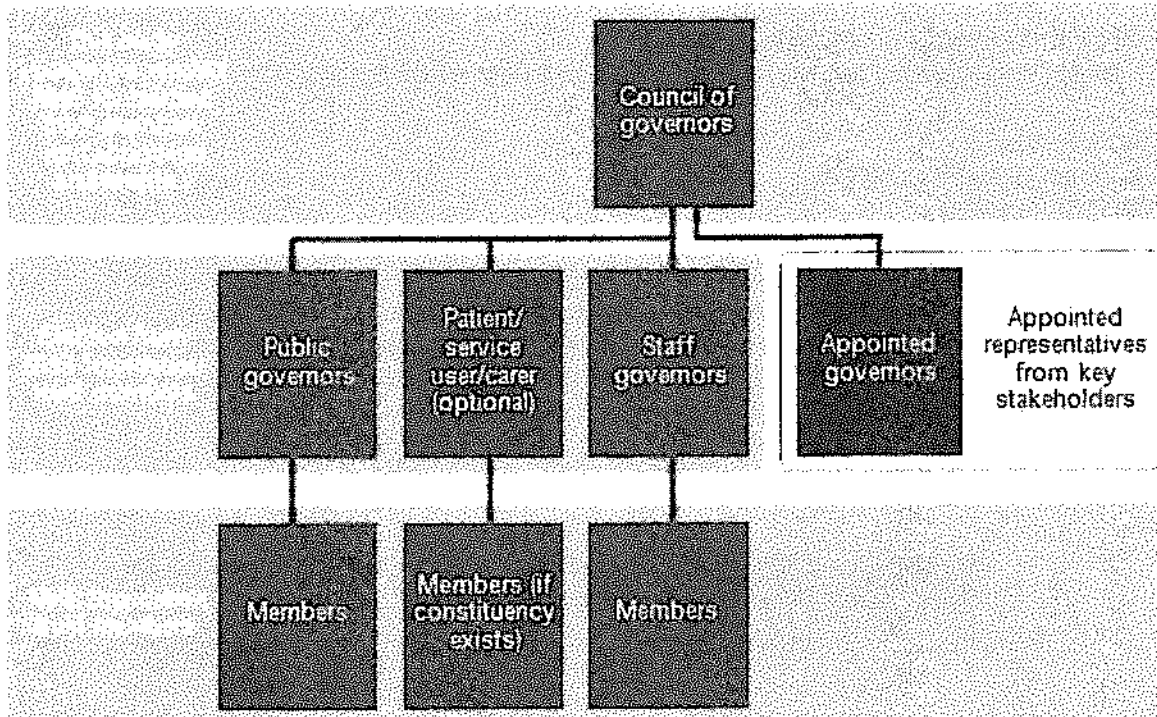
The concept of an NHS foundation trust rests on local accountability, which governors perform a pivotal role in providing. The council of governors, collectively, is the body that binds a trust to its patients, service users, staff and stakeholders. It consists of elected members and appointed individuals who represent members and other stakeholder organisations. The 2006 and 2012 Acts set out governors' various statutory responsibilities.

<sup>2</sup> Monitor's *Code of Governance* will be updated in 2013/14; the revised version will be available on our website.



Governors are unpaid and contribute part-time on behalf of the trust that they represent. They are not directors and should not seek to act in a directorial capacity as their role is very different.

**Figure 3: Illustration of the structure of the council of governors**



The chair of the board of directors is also the chair of the council of governors. This is a legal requirement. The constitution of the NHS foundation trust must also make provision for another person to act as the chair in the chair's absence.

The 2012 Act adopts the term 'council of governors' from 1 October 2012 onwards, but other terms are acceptable. Alternatives used by some trusts include:

- governors' council;
- membership council;
- members' council; or
- governors' body.

#### **Election to the council of governors**

There are different categories of governors, which vary by the types of trust members that they represent. Each category, along with the circumstances in which it is elected, or identified and appointed, is covered in more detail in Chapter 3.

The members of the council of governors, other than the appointed governors, must be elected. Regulations that set out how elections for membership of the council of governors are conducted must be adhered to.

Individuals may not become or continue as members of the council of governors if they have:

- been declared bankrupt, or had their estate sequestrated;
- not been discharged in respect of a composition, or an arrangement with their creditor, or in respect of a trust deed granted for their creditor; or
- within the preceding five years, been convicted of any offence in the British Islands if 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.

An NHS foundation trust's constitution may set out further circumstances in which a person may not become, or continue, as a member of the council of governors.

### **Board of directors**

An NHS foundation trust's board of directors is responsible for all aspects of the operation and performance of the trust, and for its effective governance. This includes setting the corporate strategy and organisational culture, taking those decisions reserved for the board, and being accountable to stakeholders for those decisions. The board of directors is collectively responsible for taking actions which legally bind the trust.

All the powers of the NHS foundation trust can be exercised by the board of directors on its behalf. The board of directors must include executive and non-executive directors, and the *Code of Governance* requires that a majority of the board of directors are independent non-executive directors.

There is a general duty on the directors to promote the success of the NHS foundation trust so as to maximise the benefits for the members of the trust as a whole, and for the public. All members of the board of directors have collective responsibility as a unitary board for every decision of the board, regardless of their individual skills or status. Non-executive directors and executive directors alike share the same degree of accountability. All directors have a responsibility to challenge constructively the information and proposals made to the board, but non-executive directors have a particular duty to challenge executive directors and should scrutinise their performance accordingly.

The board of directors is also responsible for establishing the values and standards of conduct for the trust and its staff in accordance with NHS values and accepted standards of behaviour in public life, including the Nolan Principles (see page 14 for details).

### **Executive directors**

The executive directors are paid employees of the trust. They are responsible in their executive role for managing the organisation and, as board members, for the leadership and direction of the trust. This managerial role distinguishes the executive directors from the non-executive directors, who do not have a managerial role.

The executive directors must include a chief executive (who is also the accounting officer) and a finance director. In addition, one of the executive directors must be a registered medical practitioner or a registered dentist, and one must be a registered nurse or a registered midwife. The executive directors will each have particular responsibility for a specific function, but are all also collectively accountable for exercising the powers of the trust and for its performance.

### **Non-executive directors**

The non-executive directors are particularly responsible for challenging the executive directors in decision-making and on the trust's strategy, but they are collectively accountable with the executive directors for the exercise of their powers and for the performance of the trust. Unlike the executive directors, they do not have a managerial role.

The non-executive directors will include the chair. A person may only be appointed as a non-executive director if he or she is a member of the public constituency (or the patients'/service users'/carers' constituency where there is one). Where the trust has a university medical or dental school, a person may be appointed as a non-executive director if he or she exercises functions for that university or school.

### **Chair**

The chair is one of the non-executive directors and undertakes a dual role as chair of the board of directors and chair of the council of governors. This means that the chair is responsible for leading both the board and council and for ensuring that they work together effectively. The chair is also responsible for making sure that the board and council receive accurate, timely and clear information that is appropriate for their respective duties. The dual role of the chair enables clear communication between the board of directors and council of governors.

### **Differences between the director and governor roles**

To fulfil their collective responsibility for the exercise of their powers and the performance of the trust, and to be accountable for both, all executive and non-executive directors of the NHS foundation trust must:

- provide effective and proactive leadership of the trust within a framework of processes, procedures and controls which enable risk to be assessed and managed;
- take responsibility for making sure the trust complies with the conditions of its licence, its constitution, guidance issued by Monitor, relevant statutory requirements and contractual obligations;
- set the trust's strategic aims at least annually (in the forward plan), taking into consideration the views of the council of governors;
- be responsible for ensuring the quality and safety of health care services, education, training and research delivered by the trust;
- ensure that the trust exercises its functions effectively, efficiently and economically;
- set the trust's vision, values and standards of conduct and ensure the trust meets its obligations to its members, patients and other stakeholders and communicates them to these people clearly;
- take decisions objectively in the interests of the trust;

- take joint responsibility for every board decision, regardless of their individual skills or status;
- share accountability as a unitary (single) board; and
- constructively challenge the decisions of the board and help develop proposals on priorities, risk mitigation, values, standards and strategy.

Directors are paid for their skills, time and expertise in leading the trust both strategically and operationally, as well as for taking responsibility for the performance of the trust and being accountable in the event of failures.

The voluntary role of the governor is entirely different to that of a director. Governors are not expected to undertake the above duties or to be ultimately responsible for the performance of the trust. The governor's role is detailed in Chapter 3, and includes specific statutory duties, but the board of directors remains ultimately responsible for the trust's operations and performance.

The overriding duty of the board of directors is to be collectively and individually responsible for promoting the success of the NHS foundation trust so as to maximise the benefits for the members of the NHS foundation trust as a whole and for the public. This means the board is focused on providing high-quality health care to the NHS foundation trust's members and the communities it serves.

By way of contrast, the overriding role of the council of governors is to hold the non-executive directors, individually and collectively, to account for the performance of the board of directors and to represent the interests of foundation trust members and of the public.

The board is therefore responsible for the direction and performance of the trust, while the council of governors is responsible primarily for assuring the performance of the board.

#### *Partnership working*

Notwithstanding the role of the council of governors to hold the non-executive directors to account for the performance of the board, it is important that both the board of directors and council of governors see their interaction as primarily being one of constructive partnership. The board and council should seek to work effectively together in their respective roles and avoid unconstructive adversarial interaction.

#### **The Nolan Principles**

All holders of public office should adhere to the principles of public life defined by the Nolan Committee.<sup>3</sup> The committee sets out the principles for the benefit of all who serve the public in any way, so they apply to NHS foundation trust governors. The seven principles are:

1. Selflessness;
2. Integrity;
3. Objectivity;
4. Accountability;
5. Openness;
6. Honesty; and

<sup>3</sup> For further information see [www.public-standards.org.uk](http://www.public-standards.org.uk)

## 7. Leadership.

### **Committees of the board of directors**

The key committees referenced in legislation, and described more fully in the *Code of Governance*, are set out below.

#### *Nominations committee*

The *Code of Governance* states that there may be one or two nominations, or appointments, committees. If you are unsure of the structure adopted by your own trust, you can find out by referring to its constitution, listed in the [NHS Foundation Trust Directory](#) on Monitor's website, or by asking your trust directly.

The nominations committee or committees are responsible for identifying and nominating executive and non-executive directors. The governors are ultimately responsible for appointing and dismissing non-executive directors. In practice they exercise this responsibility through a nominations committee which provides a recommendation. Final decisions on the appointments of non-executive directors must be taken at a meeting of the full council of governors.

If there are two nominations committees:

- One committee will be responsible for the appointment of executive directors and the other for nominations for non-executive directors (including the chair). The committee responsible for appointing executive directors should consist of at least the chair, chief executive and other non-executive directors.
- The trust chair or an independent non-executive director may chair both committees. Alternatively, a governor may chair the nominations committee responsible for nominations of non-executive directors. Where a nominations committee is set up to appoint a trust chair, a different non-executive director or governor must chair the committee should the current chair be a candidate for reappointment.
- The nominations committee responsible for the non-executive directors should have a majority of governors.

If a trust has only one nominations committee, when it discusses nominations for appointments of non-executives, including the appointment of the chair, it should have a majority of governors on the committee and also on the interview panel.

#### *Audit committee*

The audit committee is responsible for monitoring and reviewing matters such as the integrity of financial statements of the NHS foundation trust, its internal controls and overseeing the internal audit function. It should focus on providing assurance to the board that the systems and process are functioning effectively (so that the board is discharging its duty) and that those committees that are reviewing quality information in more detail are doing so effectively.

The main roles and responsibilities of the audit committee should be set out in written terms of reference, including details of how it will achieve both.

The main roles and responsibilities of the audit committee are to:

- review the trust's internal financial controls and internal control and risk management systems, unless expressly addressed elsewhere by a separate board committee or the board itself;
- monitor the integrity of the financial statements, including any formal announcements relating to the trust's financial performance, and review significant financial reporting judgements contained in them;
- monitor and review the effectiveness of the internal audit function;
- review and monitor the external auditor's independence and objectivity and the effectiveness of the audit process, taking into consideration relevant UK professional and regulatory requirements;
- develop and implement policy on engaging the external auditor for any non-audit services, taking into account relevant ethical guidance regarding the provision of non-audit services by the external audit firm;
- report to the board of directors, identifying any matters which it considers merit action or improvement and recommend steps to take; and
- report to the council of governors on the conduct of the external audit for the year and recommend whether the council of governors should reappoint the same auditors.

The audit committee is not responsible for appointing external auditors; that is the responsibility of the council of governors. However, the audit committee plays a key role in making recommendations to the council.

The *Code of Governance* lays out the requirements for membership of the audit committee. Governors are not members of the audit committee. However, the council of governors should take the lead in agreeing with the audit committee the criteria for appointing, reappointing and removing the external auditor. The audit committee should also report to the council of governors, identifying any matters that merit action or improvement, including details such as the quality and value of the audit and timeliness of reporting and fees.

#### *Remuneration committee*

The board of directors must establish a remuneration committee comprising non-executive directors. However, if such a committee is yet to be established, the trust constitution may make provision for remuneration matters to be decided. This committee has responsibility for setting the terms and conditions of office, including the remuneration (pay and benefit entitlements) and allowances of the executive directors. However, the council of governors, not the remuneration committee, is responsible for setting the terms and conditions of the non-executive directors (including the chair).

#### **Other useful roles in the governance structure**

In addition to the key statutory roles of the chair and chief executive, the *Code of Governance* suggests other positions that can contribute to the efficient and effective running of an NHS foundation trust.

#### *Deputy chair*

The board of directors should have a deputy chair who deputises for the chair as and when appropriate.

*Senior independent director*

One of the independent non-executive directors should be appointed by the board of directors as the senior independent director (SID). This appointment should be made in consultation with the council of governors.

The SID should act as the point of contact with the board of directors if governors have concerns which approaches through normal channels have failed to resolve or for which such approaches are inappropriate. The SID may also act as the point of contact with the board of directors for governors when they discuss, for example, the chair's performance appraisal and his or her remuneration and other allowances.

The *Code of Governance* sets out further details about the SID and the meaning of "independent".

*Lead governor*

Monitor has asked all NHS foundation trusts to nominate a "lead governor". This individual will liaise between Monitor and the council of governors where, for example, we have concerns about the leadership provided to an NHS foundation trust or in circumstances where it would be inappropriate for the chair to contact us, or vice versa (for example, regarding concerns about the appointment or removal of the chair).

However, the term "lead governor" has created some confusion. Monitor did not intend the person holding this role to "lead" the council of governors or assume greater power or responsibility than other governors. We recognise that many NHS foundation trusts have broadened the original intention of this role and given greater responsibility or power to their lead governor. Every trust can decide how best to structure its own council; we continue to require only that the lead governor act as a point of contact between Monitor and the council of governors when needed. Directors and governors alike should always remember that the council of governors as a whole has the responsibilities and powers in statute, and not individual governors.

Where NHS foundation trusts choose to broaden the lead governor's role, directors and the council of governors should agree what it should and should not include. The council of governors should vote on or otherwise decide who the lead governor will be; directors (including the chair) should not be involved in this process.

Having a lead governor does not, in itself, prevent any other governor from making contact with Monitor directly if they feel this is necessary. The Independent Panel for Advising Governors can provide advice if the council approves the submission of a question to it (see Chapter 3).

Communication from Monitor to governors will, as a matter of course, be disseminated by trust secretaries.

Further information can be found in the *Code of Governance* and from your trust secretary.

*Trust secretary*

NHS foundation trusts generally have a trust secretary (sometimes known as the board or company secretary or head of governance). The trust secretary, usually an employee of the

trust, is responsible in particular for organising the meetings and administration of the board of directors and council of governors and often plays an important role in supporting the council of governors. For example, the secretary may be expected to:

- ensure the council of governors complies with its procedures laid down in the trust's constitution and/or elsewhere);
- advise the council of governors (through the chair) on all governance matters; and
- ensure information flows freely within the trust, including to/from the council of governors.

Trust secretaries are usually also available, sometimes with a membership manager, to advise and support individual governors on procedural matters and to oversee governor training and development. He or she is typically the person governors can go to with day-to-day questions. Under the *Code of Governance*, appointing and removing the trust secretary will be a joint matter for the chief executive and chair.

#### *Membership secretary or manager*

The *Compliance Framework* requires NHS foundation trusts to maintain a representative membership. Some will also provide a membership office or a membership secretary/manager, although this is not compulsory. The office may be responsible for:

- managing the flow of information between members and governors, for example, sending out newsletters, coordinating member surveys and administering membership card schemes;
- coordinating, as appropriate, the elections for the council of governors;
- providing administrative support for governors as they perform their duties; and
- maintaining the membership database and providing high level reports on membership.

Neither the trust secretary nor the membership secretary are mandatory roles and NHS foundation trusts may have established different roles to cover these responsibilities. You can check with your trust to see what functions or roles it has established to support governors and members.

#### **Governor working groups**

Some trusts have found it helpful to set up a variety of governor working groups where governors can contribute and add value. It is up to each NHS foundation trust to decide which governor working groups it would like to have in place and which topics these cover. Examples of groups some trusts have include:

- clinical quality;
- membership strategy and engagement;
- strategic planning and policy;
- patient experience; and
- auditor appointment.



## Chapter 3: The governor's role

This chapter sets out what it means to be a governor of an NHS foundation trust in formal terms. This chapter covers:

- the statutory powers and duties of governors;
- types of governors; and
- support for governors and their work.

### 3.1 What are the statutory duties and powers of the council of governors?

The 2006 Act gave the council of governors various statutory roles and responsibilities and the amendments to it, contained within the 2012 Act, expand, clarify and add to them (as shown in Table 1).

**Table 1: Governors' roles, responsibilities and powers under the legislation**

	<b>Statutory roles and responsibilities of the council of governors</b>	<b>Additional powers</b>
<b>2006 Act</b>	<ul style="list-style-type: none"> <li>• Appoint and, if appropriate, remove the chair;</li> <li>• Appoint and, if appropriate, remove the other non-executive directors;</li> <li>• Decide the remuneration and allowances and other terms and conditions of office of the chair and the other non-executive directors;</li> <li>• Approve (or not) any new appointment of a chief executive;</li> <li>• Appoint and, if appropriate, remove the NHS foundation trust's auditor; and</li> <li>• Receive the NHS foundation trust's annual accounts, any report of the auditor on them, and the annual report at a general meeting of the council of governors.</li> </ul>	<ul style="list-style-type: none"> <li>• In preparing the NHS foundation trust's forward plan, the board of directors must have regard to the views of the council of governors.</li> </ul>
<b>Amendments to the 2006 Act made by the 2012 Act</b>	<ul style="list-style-type: none"> <li>• Hold the non-executive directors, individually and collectively, to account for the performance of the board of directors (see Chapter 4);<sup>4</sup></li> <li>• Represent the interests of the members of the</li> </ul>	<ul style="list-style-type: none"> <li>• The council of governors may require one or more of the directors to attend a governors' meeting to obtain</li> </ul>

<sup>4</sup> This makes explicit a duty to hold the board to account which was already a requirement of Monitor's *Code of Governance*. The subtle difference is that in the Health and Social Care Act 2012 governors are specifically tasked with holding the non-executive directors, individually and collectively, to account for the performance of the board of directors but it should be remembered that the board operates as a unitary board.

	<p>trust as a whole and the interests of the public (see Chapter 4);</p> <ul style="list-style-type: none"> <li>• Approve "significant transactions" (see Chapter 10);</li> <li>• Approve an application by the trust to enter into a merger, acquisition, separation or dissolution (See Chapter 10);</li> <li>• Decide whether the trust's non-NHS work would significantly interfere with its principal purpose, which is to provide goods and services for the health service in England, or performing its other functions (see Chapter 11);<sup>5</sup> and</li> <li>• Approve amendments to the trust's constitution.<sup>6</sup></li> </ul>	<p>information about performance of the trust's functions or the directors' performance of their duties, and to help the council of governors to decide whether to propose a vote on the trust's or directors' performance (see Chapter 4).</p>
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#### **Additional responsibilities for NHS foundation trusts following the amendment of the 2006 Act by the 2012 Act**

##### Board meetings:

- Before each board meeting, the board of directors must send a copy of the agenda to the council of governors.
- After the meeting, the board of directors must as soon as practicable send a copy of the minutes to the council of governors.

##### Annual members' meetings:

- The trust must hold annual members' meetings. At least one of the directors must present the trust's annual report and accounts, and any report of the auditor on the accounts, to members at this meeting.
- The trust may combine the annual members' meeting with the governors' meeting, which is held for the purpose of considering the trust's annual report and accounts.
- Where there has been an amendment to the constitution which relates to the powers, duties or roles of the council of governors, at least one governor must attend the next annual members' meeting and present the amendment to members. Members have the right to vote on and veto these types of constitutional amendments.

<sup>5</sup> Any proposal by the directors to increase the proportion of total income earned from non-NHS work by five percentage points or more requires agreement by more than half of the members of the council of governors of the trust voting.

<sup>6</sup> Amendments to the trust's constitution must be approved by the council of governors. Approval means more than half of the governors voting agree with the amendments. Amendments must also be approved by more than half of the members of the board of directors voting.

Governor capability:

- The trust must take steps to ensure that governors have the skills and knowledge they require to undertake their role.

For more details on any of the governors' statutory duties and powers introduced by the amendment of the 2006 Act by the 2012 Act, please refer to the legislation, or contact your trust secretary.

### 3.2 Other activities

Governors may also become involved in many areas not covered by the legislation. However, they should remember that they do not play an operational role within the trust. Although NHS foundation trusts may choose to involve governors in hospital visits or volunteering, governors neither have a right to inspect NHS foundation trust property or services nor a duty to meet patients and conduct quality reviews.

Many NHS foundation trusts have greatly benefited from the skills and experience of their governors. Listed below are just a few examples of other duties that governors in some trusts have undertaken. However, again, these are activities which have been decided at a local level and are not compulsory:

- holding constituency meetings to communicate with members and understand members' views;
- providing a governor perspective on aspects of the trust's performance;
- developing and reviewing the membership strategy to make sure that levels of representation and engagement are maintained and increased as appropriate;
- working with other local representative bodies;
- working with hospital volunteers; and
- giving talks to interested stakeholders.

Organisations such as the [Foundation Trust Network](#) and [Foundation Trust Governors' Association](#) may provide additional support and advice in these areas. More details about these organisations can be found in Chapter 12.

### Types of governors

There are different types of governors but they all have the same statutory role and responsibilities. The main differences arise from the types of trust members that particular governors represent. However, there are minimum requirements on the composition of the council of governors, including that there must be a majority of public governors.

#### Public governors

Public governors are elected by the members of the trust's public constituency. An NHS foundation trust will typically divide its public constituency into areas covering the geographical areas where the majority of the trust's patients and/or service users reside. Members of these areas will elect governors to represent their area. A trust may also choose to have a "rest of England" constituency if its patients or service users are particularly widely dispersed, as may be the case for some specialist trusts in particular.

NHS foundation trusts have a legal duty to make sure their public constituencies are representative of those eligible for membership.

Public governors, like all governors, have a primary responsibility to represent the interests of the NHS foundation trust members who elected them as well as other members of the public. The 2006 Act states that more than half of the council of governors must be made up of public governors (including patient, carer or service user governors if the NHS foundation trust has a patient/carer/service user constituency).

### **Patient, carer and service user governors**

NHS foundation trusts can opt to have a patient/carer/service user constituency. If this is the case then the trust will have patient, carer and service user governors to represent it. As people who are very close to the services provided by the NHS foundation trust, patients, carers and service users may bring particular insight and knowledge to the council of governors about the trust's efficiency and effectiveness, and the patient experience.

The role of this type of governor is the same as that of public and staff governors, namely, to hold the non-executive directors, individually and collectively, to account for the performance of the board of directors, and to represent the interests of the members of the patient/carer/service user constituency, the members of the trust as a whole, and the public.

### **Staff governors**

Staff governors have the same role as public governors and patient/carer/service user governors in that they are responsible for holding the non-executive directors, individually and collectively, to account for the performance of the board of directors, and for representing the members of the staff constituency, the members of the NHS foundation trust as a whole, and the public. A staff governor should not seek to act as a staff representative or union representative on employment issues, as there are other channels for dealing with such concerns.

Staff governors may however face different challenges from those faced by public or appointed governors. For example, they may need support to obtain time off from their jobs to attend meetings.

As employees of the trust, staff governors bring a unique understanding of the issues faced by an NHS foundation trust, which they should seek to use in representing their members' interests and holding the non-executive directors to account for the performance of the board.

The 2006 Act requires at least three members of the council of governors to be staff governors. Where there are different classes of staff within the staff constituency, such as "Nursing", "Medical" and "Management", each class must be represented by at least one governor.

### **Appointed governors**

Legislation requires that the council of governors also appoints representatives of certain defined stakeholders to help tailor its governance to local circumstances. These appointed governors are representatives of organisations with whom NHS foundation trusts may wish to have a strong relationship. They can be from any organisation, providing appointed

governors are drawn from one or more qualifying local authorities and, where the trust includes a university medical or dental school, one appointed governor is from the university/school.

Trusts are no longer required to appoint a governor from a PCT, which have now been abolished. There is no equivalent requirement to appoint a governor from one or more CCGs in their place, although trusts are free to do this if they wish.

An NHS foundation trust's constitution will identify the stakeholders who are entitled to appoint representatives to the council of governors. Such stakeholders may include, for example, local voluntary groups, the police, trade unions or charities. There is no difference between the responsibilities of an elected and an appointed governor, other than whom they represent.

The role is not defined in statute but we expect that appointed governors will work to further the relationship between their own organisation and the NHS foundation trust, and seek to benefit the trust where possible through the relationship.

#### **Governor terms of office**

There is no reference in legislation to a maximum number of years that a governor may serve on a council of governors but many trusts choose to impose a limit and, if so, this will be set out in the trust's constitution.

There is a legislative maximum for each term of office: the 2006 Act states that elected governors (ie, public, patient and staff governors) may hold office for a period of up to three years. A governor is eligible to stand for re-election at the end of this period, after which they may be re-elected for further terms of up to three years, providing they remain eligible. Governor terms may also be for less than the maximum three years.

There is no statutory rule as to the total number of years that a governor may serve, although some trusts may self-impose a maximum limit such as the "9 year rule" (also known as the "3x3 method") whereby governors may be elected to serve a maximum of three terms of office, each of three years.

Governors should check the terms of office set out in the trust's constitution, and directors and governors should consider the advantages, and disadvantages, of having governors serving, subject to re-election at three-year term intervals, for a long period of time.

#### **Provision of information by directors to governors**

Directors should ensure that governors receive the information they need to undertake their role effectively. The 2006 Act, as amended, specifies that agendas and minutes of meetings of the board of directors must also be sent to the council of governors. Directors and governors should seek to agree the format for, and level of detail of, such information. Please note that there is no legal basis on which the minutes of private sessions of board meetings should be exempted from being shared with the governors. In practice, it may be necessary to redact some information, for example, for data protection or commercial reasons. Governors should respect the confidentiality of these documents.

If governors feel they are not getting the information they need from the trust in order to conduct their duties effectively, they should speak to the chair, clarifying what additional information they would like to receive. If the governors are not satisfied with the chair's response, they may also consider speaking to the senior independent director or another non-executive director.

#### *Board meetings held in public*

It is a legal requirement for the constitution to provide for meetings of the board of directors that are open to members of the public. However, the constitution may provide for members of the public to be excluded from a meeting for special reasons. Again this does not mean that governors should not receive the agenda and minutes from these meetings. This imposes a serious duty of confidentiality on governors.

Unless there are specific provisions in the trust's constitution on this issue, governors are not required to attend public meetings of the board of directors, but may do so if they wish.

How public board meetings are conducted will be at the discretion of each trust. Some may have procedures to permit questions from governors, members and the public, and others may not.

#### **Annual members' meetings**

The 2006 Act, as amended, states that NHS foundation trusts must hold an annual meeting of their members, an "Annual Members' Meeting". This meeting must also be open to the public.

At least one member of the board of directors must attend the meeting and present the annual accounts, any auditor report on them, and the annual report.

When the trust wants to make an amendment to the constitution concerning the powers or duties of the council of governors (or otherwise with respect to the role that the council of governors has as part of the trust), at least one governor must attend the next annual members meeting and present the amendment. The trust must also give the members an opportunity to vote on whether they approve the amendment. More than half the members voting must approve the amendment, or it will cease to be valid and the trust will have to take such steps as necessary as a result.

#### **Panel for Advising Governors**

Under the 2006 Act, as amended, Monitor has appointed a Panel for Advising Governors (the Panel) to which governors of NHS foundation trusts may refer a question concerning whether their trust has failed, or is failing, to act in accordance with its constitution, or Chapter 5 of the 2006 Act.

A governor may only refer a question to the Panel if more than half of the members of the council of governors voting approve the referral. The Panel will first decide if the referred question meets the criteria for its consideration. If the question is accepted by the Panel, the Panel will consider the available information, and is likely to request further information from the governors and/or the trust. The Panel will then decide whether to carry out an investigation in relation to the referred question. If an investigation is carried out, the Panel will publish a report setting out the conclusion.

If such a question or any other important issue or uncertainty arises, governors should always seek to discuss it in the first instance with the chair or another non-executive director. Referral of a question to the Panel should be as a last resort if governors are not able to obtain an answer to a relevant question through discussion internally.

### **Governor training**

It is the trust's duty to take steps to ensure that governors are equipped with the skills and knowledge they need to discharge their duties appropriately. The directors will therefore need to make sure their trust has appropriate training arrangements in place both for new and existing governors, and that these are regularly reviewed and refreshed. Directors may opt to use outside training programmes or consultants to help fulfil this duty, but the overall responsibility remains with the trust.

Training sessions should be scheduled to be as easy as possible for governors to attend. This might mean, for example, scheduling training around council meetings. Governors should make every effort to attend any training that has been arranged for them by the trust or otherwise paid for by the trust.

Trusts should also consider giving governors access to specific expertise when they request it, so that governors have appropriate and objective guidance. For example, governors might find expert human resources (HR) advice helpful when they are asked to appoint a new chair or new non-executive directors.

### **Other support for governors**

Trusts may provide travelling and other expenses for governors to attend council meetings and committee or working group meetings, as well as to any training events that the trust is asking governors to attend. The rates for such expenses will be determined by the trust.

### **Participation by governors in working groups and sub-committees**

Trusts and governors may choose to have working groups and sub-committees on which governors may sit to help in specific areas of work, such as audit and finance, recruitment, patient experience and membership committees. The full council should set the terms of reference of such working groups and sub-committees, including how governors are elected or appointed to the group. The council of governors has no power of delegation, so governor working groups and committees can make recommendations to and advise the full council but cannot make decisions on its behalf. The board, by way of contrast, does have power of delegation to committees of the board, and therefore board committees can have decision-making powers.

## Chapter 4: General duties of the council of governors

*The 2006 Act, as amended, specifies that it is the duty of the council of governors to hold the non-executive directors individually and collectively to account for the performance of the board of directors. While the board is a unitary body which takes collective responsibility for the performance of the trust, the governors' role in assurance should take place primarily through the non-executive directors. It is also the duty of the council of governors to represent the interests of NHS foundation trust members and the public.*

*This represents a change from Monitor's 2010 Code of Governance. The next iteration of the Code of Governance will be updated accordingly.*

*This chapter covers:*

- *the legal requirements;*
- *what it means to hold the non-executive directors to account;*
- *what it means to represent the interests of members and of the public; and*
- *what the board of directors should do to support governors in these duties.*

### 4.1 Holding the non-executive directors to account

#### **What are the legal requirements?**

The council of governors has a duty to hold the non-executive directors individually and collectively to account for the performance of the board of directors.

The meaning of "holding the non-executive directors to account" is not described in legislation, which means there is no one "right way" to hold the non-executive directors to account. This may reasonably lead to a variety of interpretations by different councils of governors and boards of directors – this chapter aims to help guide their interpretations.

#### **What does it mean to hold the non-executive directors to account?**

The key principles guiding governors' understanding of what it means to hold the non-executive directors to account are shown in Table 2 (see page 27). It also lists the related statutory duties of governors and directors, and suggested methods that governors can use to hold non-executive directors to account.

In summary, "holding the non-executive directors to account" requires governors to scrutinise how well the board is working, challenge the board in respect of its effectiveness, and ask the board to demonstrate that it has sufficient quality assurance in respect of the overall performance of the trust. This is likely to involve questioning non-executive directors about the performance of the board and of the trust and making sure to represent the interests of the trust's members and of the public in doing so. In performing this duty, governors should keep in mind that the board of directors continues to bear ultimate responsibility for the trust's strategic planning and performance.



**Table 2: Key principles guiding governors' understanding of what it means and how to hold the non-executive directors to account, and related statutory duties**

### **Key principles**

1. The overall responsibility for running an NHS foundation trust lies with the board of directors.
2. The council of governors is the collective body through which the directors explain and justify their actions, and the council should not seek to become involved in running the trust.
3. Governors must act in the best interests of the NHS foundation trust and should adhere to its values and code of conduct.
4. Directors are responsible and accountable for the performance of the foundation trust; governors do not take on this responsibility or accountability. This is reflected in the fact that directors are paid while governors are volunteers.

### **Undertaking the statutory duties**

**This document is not intended to set out "best" or even "good" practice, which will become clearer over time. The following are examples of activities that governors might undertake in seeking to hold the non-executive directors to account, but the approach will be decided at a local level.**

- Governors are responsible for appointing the chair and other non-executive directors and may also remove them in the event of unsatisfactory performance.
- Governors have the power to appoint or remove the auditor.
- Directors must take account of governors' views when setting the strategy for the trust, giving governors the opportunity to feed in the views of trust members and the public and to question the non-executive directors if these views do not appear to be reflected in the strategy. However, governors should understand there may be valid reasons why member views cannot always be acted upon. Governors and non-executive directors should have enough time to discuss these matters so governors can be satisfied with board decision-making processes.
- Governors have the right to receive the annual report and accounts of the trust, and can use these as the basis for their questioning of non-executive directors and assessing the performance of the board in terms of the delivery of the trust's goals against the forward plan.

### **Governors may also find it helpful to undertake some of the following activities**

To hold the non-executives individually to account:

- a) Receive performance information for the chair and other non-executive directors as part of a rigorous performance appraisal process as well as to inform decisions on remuneration terms for the chair and the other non-executive directors.

- b) Observe the contributions of the non-executive directors at board meetings and during meetings with governors.

To hold the non-executive directors collectively to account:

- a) Receive the quality report and accounts and question the non-executives on their content. Ask about the CQC's judgements on the quality of care provided by the trust.
- b) Receive in-year information updates from the board of directors and question the non-executives on their content, including the performance of the trust against the goals of the forward plan.
- c) Invite the chief executive or other executive and non-executive directors to attend council of governors meetings as appropriate and use these opportunities to ask them questions.
- d) Engage with the non-executive directors to share concerns, such as by way of joint meetings between the council of governors and non-executive directors.
- e) Receive information on proposed significant transactions, mergers, acquisitions, separations or dissolutions and question the non-executives on the board's decision-making processes, and then, if satisfied, approve the proposal.
- f) Receive information on documents relating to non-NHS income, in particular any proposal to increase the proportion of the trust's income earned from non-NHS work by 5% a year or more, and question the non-executives on the board's decision-making processes; then, if satisfied, approve the proposal.

#### **Additional means by which governors can hold non-executive directors to account**

**Only to be used after all other methods of communication between the directors and governors have been exhausted.**

- a) Put questions to the Panel for Advising Governors where the circumstances meet the requirements in the 2006 Act, as amended (see page 24 for details of the Panel).
- b) As a last resort, engage in a dialogue with Monitor through the lead governor.

#### **General considerations**

Holding the non-executive directors to account for the performance of the board does not mean the governors should question every decision or every plan. The role of governors in "holding to account" is one of assurance of the performance of the board. Governors should therefore assess what they believe are the key areas of concern and provide appropriate challenge, particularly if they feel due process is not being followed, the interests of the members and of the public are not being appropriately represented, or the trust is at risk of breaching the conditions of its licence or of failing to deliver on the goals in the forward plan.

Governors may not always agree with the decisions taken by the directors. On the other hand, directors do not always have to adhere to the governors' preferences. However, the board of directors, as a whole, does have to give due consideration to the views of the governors, especially in relation to matters which concern the interests of the members of the NHS foundation trust and the public.

**Governors' liability**

The 2006 Act, as amended, does not make explicit reference to governors' liability. Governors' duty to "hold the non-executive directors, individually and collectively, to account for the performance of the board of directors" does not mean that governors are responsible for decisions taken by the board of directors on behalf of the NHS foundation trust. Assuming the governors have acted in good faith and in accordance with their duties as set out in the Act (and proper process has been followed), the potential for liability should be negligible. As additional comfort, governors may have the benefit of an indemnity and/or insurance from the trust. While there is no legal requirement for trusts to provide an indemnity or insurance for governors to cover their service on the council of governors, where an indemnity or insurance policy is given, it is likely to be detailed in the trust's constitution. Please see page 64 for details on this topic in relation to governors' role in approving significant transactions, mergers, acquisitions, separations and dissolutions.

**Deciding on a process**

The governors and directors should agree a regular process for holding the non-executive directors to account for the performance of the board effectively throughout the year. This process should specify:

- what information governors require from the directors, the format of the information and the timescale within which it should be provided;
- the forums at which governors will have the opportunity to question directors;
- what steps to take should the governors be dissatisfied with responses they receive from one, or more, of the non-executive directors; and
- when governors should use their power to require directors to attend a governors' meeting.

The board of directors is likely to start by giving an account of the work it has done in directing the NHS foundation trust to ensure the trust delivers high-quality services. This account will provide governors with a basis for asking informed questions.

The purposes of this process are:

1. to provide governors with a degree of assurance on the performance of the board; and
2. to allow the board of directors to ensure governors have the right level and value of assurance available to them.

The process requires ongoing interaction and partnership between councils of governors and boards of directors.

**Information exchange**

Directors should ensure that governors are provided with sufficient information on the board's performance, and that the information is available in appropriate formats.

The board should ensure governors have opportunities to meet with directors and non-executive directors so that governors can raise questions about the board's performance. It should also provide governors with evidence that their views and the interests of the

members of the NHS foundation trust and the public have been taken into account in formulating the forward plan.

## 4.2 Representing the interests of trust members and the public

### What are the legal requirements?

Under the 2006 Act, as amended, governors have a duty to represent the interests of the members of the NHS foundation trust and the public. However, the meaning of this is not defined in legislation. This means there is no one "right way" to fulfil this duty, which may lead to a variety of interpretations by different councils of governors.

### What does it mean to represent the interests of members and the public?

Table 3 lists the key principles that will inform how governors decide to fulfil this duty and suggests some methods that governors may wish to employ. Governors will, of course, need to engage regularly with the NHS foundation trust's members and the public in order to represent their interests effectively. Further information on member engagement can be found in the Monitor publication *Current practice in NHS foundation trust member recruitment and engagement*.

**Table 3: Key principles to inform how governors decide to represent the interests of members and the public and some suggested methods**

#### Key principles

1. Governors should seek the views of members and the public on material issues or changes being discussed by the trust.
2. Governors should feed back to members and the public information about the trust, its vision, performance and material strategic proposals made by the trust board.
3. Governors should try to make sure when they are communicating with directors of the trust that they represent the interests of members and the public rather than just their own personal views.

#### Possible methods for governors to seek the views of members and the public and feed information back to them

**This document is not intended to set out "best" or even "good" practice, which will become clearer over time. The following are examples of activities that governors might undertake in gaining the views of members and the public but the approach will be decided at a local level.**

- a) Governor drop-in days where members and the public can come in to meet with governors.
- b) A governors' and members' section of the trust website to share information.
- c) Member days where members and the public are invited to the trust for a day and governors take time to speak to them.
- d) Surveys of members (with help provided from the trust to administer where necessary).

**General considerations**

Governors have a general duty to represent the interests of members and the public and this includes representing their views in relation to potential:

- significant transactions;
- mergers;
- acquisitions;
- separations and dissolutions of the trust; and
- increases to non-NHS income.

Governors should therefore interact regularly with the members of the trust and the public to ensure they understand their views, and to make sure that they clearly communicate to them information on trust performance and planning. However, governors should take care to disclose only those matters which the trust considers non-confidential.

**Deciding on a process**

Governors should establish a process for interacting with members and the public and recording their views on key topics.

Governors should also ensure that members and the public know when and where they are able to communicate with governors for this purpose. How the trust and governors organise this process is at their discretion.

Ideas for feeding back views to directors might include having a regular monthly or quarterly report, presentations at council meetings or a regular meeting of the membership committee, if this exists, to discuss feedback. Again, it is at the discretion of the trust and governors to choose what works best locally. Governors should remember that they have a duty to represent the public as well as members of the trust; it may be helpful to work with other local public representatives such as local Healthwatch to do this.

**What the board of directors will need to do to support governors**

The board of directors can greatly assist governors in performing their duty to represent the interests of members and the public. The board should help to arrange opportunities for governors to meet with members of the trust and the public; it will also need to support governors in their work to understand the interests of the public, and of people using the trust services, their carers and families.

When governors represent the views of members and the public to the board, the directors should record these views and consider them in formulating trust strategy and assessing trust performance in related areas.

## Chapter 5: Appointing and removing the chair and other non-executive directors

*The non-executive directors provide independence, balance and challenge to the executive element of the board of directors. The chair, as one of the non-executive directors, performs a crucial role in the NHS foundation trust as both the chair of the board of directors and the chair of the council of governors. This chapter sets out some of the key issues that governors will need to consider concerning the chair and other non-executive directors, including:*

- *appointing the chair and other non-executive directors;*
- *terms and conditions; and*
- *removing the chair and other non-executive directors.*

*All detail and processes are relevant in regard both to chairs and other non-executive directors, unless otherwise explicitly stated.*

### 5.1 Background

#### **What are the legal requirements for appointment and removal?**

The 2006 Act requires that an NHS foundation trust has non-executive directors. The number of non-executive directors will be set out in the individual NHS foundation trust's constitution.

It also states: "It is for the council of governors at a general meeting to appoint or remove the chairman and the other non-executive directors." This means it is for the council of governors as a whole (rather than, say, a committee or a working group) to appoint or remove the chair and the other non-executive directors.

In accordance with the legislation:

- appointing the chair and the other non-executive directors requires approval by a majority of the governors attending the relevant general meeting; and
- removing the chair and the other non-executive directors requires the approval of three-quarters of the entire council of governors, not just of those who attend the meeting at which the removal is to be discussed and decided.

#### **Terms and conditions**

The 2006 Act says: "It is for the council of governors at a general meeting to decide the remuneration and allowances, and the other terms and conditions of office, of the non-executive directors."

This means that the council of governors is not only responsible for appointing the non-executive directors, including the chair, it also sets the terms of those appointments.

## 5.2 Appointing the chair and other non-executive directors

The *Code of Governance* states that: "There should be a formal, rigorous and transparent procedure for the appointment or election of new members to the boards of directors."

As the chair leads both the board of directors and council of governors, governors will need to do a considerable amount of work to ensure that their NHS foundation trust has the right chair in place. The governors must also ensure that the other non-executive directors are fit and proper persons to serve the NHS foundation trust in this role.

### General considerations

Further detail about the roles of the chair and non-executive directors is provided in the *Code of Governance*. Governors should read this carefully before beginning an appointment or reappointment process. As the chair is one of the non-executive directors, any information provided in this guidance or in the *Code of Governance* on non-executive directors is also relevant.

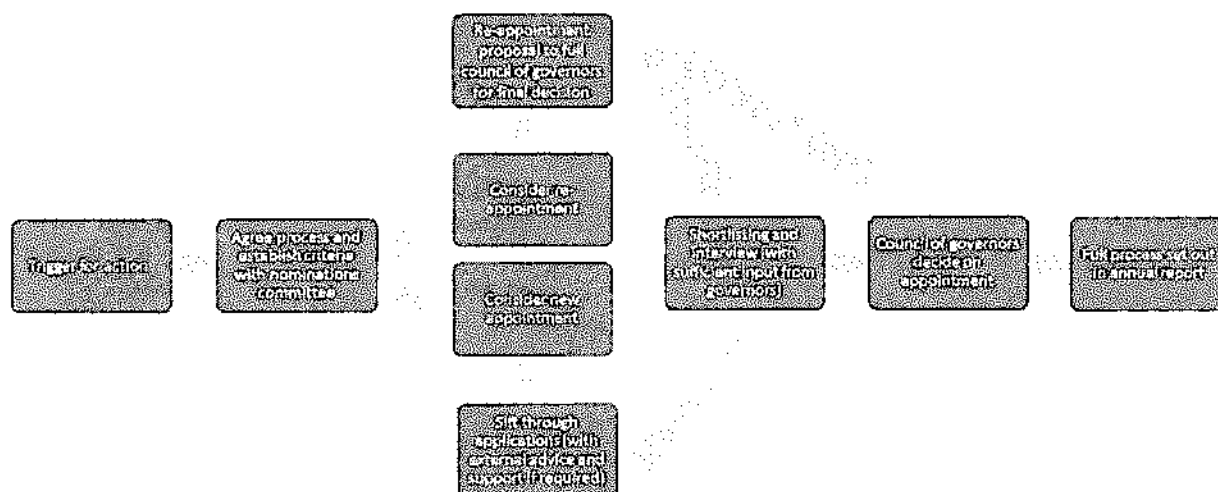
The procedure for all appointments or reappointments must be formal, rigorous and transparent. The appointment must be awarded on merit and based on objective criteria developed in the best interests of the trust. The process should be described in the NHS foundation trust's annual report.

As part of the process, the governors should consider the relevant aspects of the NHS foundation trust's constitution and the *Code of Governance*, such as:

- the requirements of the NHS foundation trust's constitution concerning the number of non-executive directors;
- the independence of non-executive directors;
- any specific skills and experience requirements such as the need to ensure relevant and recent financial experience when appointing non-executive directors to the audit committee; and
- the balance of executive and independent non-executive directors on the board of directors.

## Process for appointing the chair and other non-executive directors

Figure 4: Key stages for appointing the chair and other non-executive directors



### Triggers for action

The most common trigger for action will be the impending expiry of the existing chair or other non-executive director's term of appointment.

- If the chair or non-executive director decides to seek reappointment, the council of governors will need to decide whether it is in the best interests of the NHS foundation trust for this to happen.
- If the current chair or non-executive director does not seek reappointment or the council of governors decides that reappointment is not appropriate, the council of governors will need to make a new appointment.
- Governors also have the power to remove an existing chair or non-executive director. If they use this power, they will need to make a new appointment.

### Agree process and establish criteria

The governors and nominations committee should together agree a clear process for nominating a new non-executive director or reappointing an existing non-executive director. This process should include taking appropriate advice from within the NHS foundation trust, for example, from the trust's own HR department where necessary and from the chair in the case of other non-executive directors.

Where there is a second, specific nominations committee dealing with the chair and the other non-executive directors, the council of governors should agree a process with that committee. Where there is only one nominations committee to appoint both executive and non-executive directors, the council of governors should appoint a working group (unless such a group exists permanently) to agree the process with the nominations committee and to report back to the council of governors.



In either case, the nominations committee should decide a job description and person specification defining the role and capabilities required, including an assessment of the time commitment required to perform the role. The committee should propose terms and conditions for the post and, if appropriate, the post may be advertised. These matters should be agreed with the governors' working group where there is one.

The nominations committee, and where appropriate the governors' working group, should take into account the views of the board of directors (particularly the non-executive directors in the case of the chair's appointment) on the process in general and the qualifications, skills and experience required for the position. For example, during the non-executive directors' appointment process, if the directors advise that the board of directors lacks specific professional experience (eg, legal, clinical or accountancy), the recruitment process should reflect the need for that experience. In the same way, the nominations committee should consult other key stakeholders as appropriate.

#### **What if reappointment is sought?**

Where an existing chair or other non-executive director seeks reappointment, the nominations committee and, where appropriate, the governors' working group, should look at the existing candidate against the current job description and person specification for their role at the NHS foundation trust (the nominations committee should continually review and update both). In addition, it should consider the following matters.

#### **Annual performance appraisals**

Conducting an appraisal of the candidate's past performance at the NHS foundation trust, with particular regard to delivery of the role's objectives, will help the council of governors significantly in performing its statutory duties, particularly when considering the reappointment or removal of the chair or other non-executive directors.

- For the chair: the council of governors should take the lead on determining what the process will be for evaluating the chair. The senior independent director would be expected to lead the actual appraisal (although one or more governors may also play a significant role) and confirm to the governors whether, following formal performance evaluation, the performance of the chair continues to be effective and demonstrates commitment to the role. The focus of the chair's appraisal will be his or her performance as chair of the board of directors. Since the primary aim of the chair's work will be to lead the directors in executing the trust's forward plan, the appraisal should consider carefully the chair's performance against pre-defined objectives supporting that aim.

The fact that the focus of the chair's appraisal will be his or her performance as chair of the board of directors does not mean that appraising the chair's performance as the chair of the council of governors is not a highly relevant part of the appraisal. Rather, it reflects the 2006 Act, which states that the chair of the board of directors also chairs the council of governors (and not the other way around), and the fact that it is for the governors to appoint, and remove, the chair and the other non-executive directors. That said, the appraisal process should still be used to evaluate all relevant performance issues, including those relating to the council of governors, but these should not be the main issues for consideration in relation to reappointment of the chair, in their capacity as a non-executive director.

The outcome of the evaluation should be discussed and agreed with the council of governors. Where an NHS foundation trust has already developed its own processes for evaluating the chair, the council of governors should periodically review the effectiveness of the process.

- For the other non-executive directors: the council of governors and the chair should agree a process for evaluating the non-executive directors. The evaluation should carefully consider their performance against pre-defined objectives that support the execution of the trust's forward plan. The chair of the council of governors will lead on setting objectives for the non-executive directors and carrying out the appraisals. The chair should confirm to the governors that, following formal performance evaluation, the performance of the individual non-executive director proposed for reappointment continues to be effective and demonstrates commitment to the role. The governors should then agree the outcome of the evaluations.

### **Commitments**

Any changes in the candidate's other significant commitments will be relevant. The governors should assess the candidate's availability against the time required for the role of chair or non-executive director.

### **Refreshing the board of directors**

Refreshing the board provides an opportunity to reassess the skills, knowledge and experience required by the NHS foundation trust. It ensures the board of directors is exposed to new approaches, experiences and ways of working. It is healthy for the NHS foundation trust progressively to refresh the board of directors and this includes the chair and other non-executive directors.

The nominations committee(s) and its serving governors should therefore ensure that succession planning is undertaken effectively at the trust and that any skills gaps at the board level are identified and addressed.

### **Terms of office**

If the nominations committee decides to recommend reappointment, it should specify a term of no longer than three years. Any candidate that has already served six years or more in the post should be rigorously reviewed and the process should take into account the need for progressive renewal of the board of directors.

The *Code of Governance* states that "non-executive directors may serve longer than six years" subject to annual re-appointment, but this requirement for annual reappointment makes clear that this should be the exception rather than the norm. The council of governors can determine the terms and conditions of non-executive directors' appointments, including the term of office.

### **Independence**

Any changes in the independence of the non-executive director (as described in the *Code of Governance*) should be taken into account. In the case of a non-executive director, the length of service is relevant to the determination of his or her independence in accordance with the *Code of Governance*. The *Code* requires that at least half of the board of directors,

excluding the chair, should comprise non-executive directors determined by the board to be independent.

### **Temporary appointments**

When appropriate plans are in place, NHS foundation trusts are likely to need temporary arrangements only in exceptional circumstances. However, under such circumstances, such as a sudden vacancy, the governors may need to consider making a temporary appointment while the formal appointment process is running. For the post of chair, the deputy chair may be able to fill the chair role for the period required. The NHS foundation trust should refer to its constitution in the first instance.

Once these processes have been undertaken, the nominations committee or working group can put the reappointment proposal to the full council of governors for a final decision.

### **What if a new appointment needs to be made?**

It is a statutory requirement for every NHS foundation trust to have non-executive directors, one of whom is the chair. The NHS foundation trust will need to seek a new appointment if an existing chair or other non-executive director:

- does not seek reappointment at the end of his or her current term;
- seeks reappointment and this is not approved (for the chair this includes without competition); or
- is otherwise removed by either the council of governors or following enforcement action taken by Monitor.

Whether or not a new non-executive director appointment is required will depend on the NHS foundation trust's constitutional requirements and the needs of the trust. This issue should be discussed with the board of directors and, in particular, with the chair.

A new appointment will, of course, make it impossible for the council of governors to rely on previous internal performance evaluations. As a result, the appointment process will need particular care and scrutiny and the nominations committee should take the lead in ensuring that a well-defined and robust recruitment process is in place. In many cases, it will be appropriate to take external recruitment advice.

### **Getting the right external advice and support**

The council of governors is likely in many cases to decide that, in addition to advice and support offered by the NHS foundation trust's own HR specialists, taking external advice on recruitment and the search process is appropriate. The council of governors should take this decision in collaboration with the nominations committee or governors' working group. Proposals for obtaining external support will need to be agreed with the board, or a representative executive director, as the board will need to authorise the necessary expenditure.

Typical reasons for seeking external advice include a limited experience of senior recruitment within the governor group or where tough employment market conditions

prevail. If selecting external advisers, governors should consider matters including the potential advisers':

- previous experience of board-level recruitment;
- independence from the NHS foundation trust;
- track record of successful appointments;
- previous experience of public sector recruitment;
- knowledge of the health sector and candidate research ability; and
- selection principles and processes, such as candidate assessment techniques.

### **Applications**

The nominations committee, with input, where appropriate, from a governors' working group and other key stakeholders, should sift through applications received for the post following its advertisement. The sifting process should seek to produce a diverse field of strong candidates for interview. The precise nature of this sifting will depend upon the circumstances in which the vacancy arose, the number of applications received and of candidates that are potentially appropriate for appointment. Again, this process may require external assistance, for example, from a recruitment consultant.

The nominations committee (taking into account the views of other non-executive directors and the governors' working group where there is one) should then draw up a shortlist of, preferably, three or four candidates, but certainly no fewer than two candidates.

### **Shortlisting and interview**

NHS foundation trusts should ensure that governors make up a majority of the votes on the interview panel. Typically, the nominations committee, with participation, where appropriate, from the governors' working group, will interview the shortlisted candidates. The interviewers should then decide which of the shortlisted candidates are appointable and put forward a recommendation for a final decision, typically in a final report.

The nominations committee's final report, incorporating the proposal for reappointment or the presentation of the new candidate(s), should be presented to the council of governors for consideration. The report should:

- summarise the process followed by the nominations committee, including the selection criteria where appropriate;
- describe how, and to what extent, the candidates meet the criteria for the role and their relative strengths and weaknesses;
- recommend how the council of governors should proceed; and
- at all times maintain confidentiality concerning the applicants in accordance with the NHS foundation trust's own protocols.

### **How will the final decision be made?**

The council of governors must then decide on an appointment in accordance with its statutory obligations. As part of this, the council of governors will consider the issues set out

in the report and any other factors it considers relevant. In particular, it should satisfy itself that the:

- appointment process has complied with all applicable law and advice;
- appointment process was both legal and appropriate; and
- proposed appointee has the right qualities to meet the job description, taking into account the views of the board of directors on the qualifications, skills and experience required for the position.

Once the appointment decision is made:

- For the chair – the senior independent director and the governors should set the appointee objectives for the coming year.
- For the other non-executive directors – the chair and the governors should set the appointee objectives for the coming year.

### **Next steps**

The full process followed should be described in the NHS foundation trust's annual report.

### **What other responsibilities are there?**

#### *Appointing a deputy chair*

The constitution of the NHS foundation trust should make provision for another person to act as chair of the council of governors in the absence of the chair. The governors should appoint a deputy chair of the council of governors from among the other non-executive directors. The board or chair would normally make a recommendation to the governors for this role.

The deputy chair's role is to stand in for the chair as required, so this appointment should be made on the same basis as the appointment of the chair. However, the process of appointment will differ because the council of governors will look for applicants from among the current non-executive directors and choose one of them. The *Code of Governance* states that the senior independent director could be the deputy chair.

The deputy chair of the council of governors must hold the confidence of the board of directors. Governors should therefore seriously consider the views of the board and of the chair when making their choice.

If the council of governors decides that none of the candidates are appropriate for the role, it should consider its next steps in the light of the NHS foundation trust's constitution and the need for a deputy chair.

#### *Appointing the senior independent director*

The board of directors appoints the senior independent director, in consultation with the council of governors. Further detail on the senior independent director role can be found in the *Code of Governance*.

### **5.3 Terms and conditions of the chair and other non-executive directors**

Significant factors in attracting, retaining and motivating the chair and other non-executive directors are the terms and conditions on offer to them, including levels of pay. This section provides advice on how governors should strike a balance between motivating the right candidates and paying no more than is necessary.

#### **What are the terms and conditions?**

The terms and conditions will form the chair and other non-executive directors' contract for services with the NHS foundation trust. They will cover a variety of issues, the most important of which will include the:

- term that the chair and non-executive director will serve;
- responsibilities of the chair and non-executive director;
- remuneration and allowances that the chair and non-executive director will receive – this will include any pay that the individual receives, but can also include non-taxable elements;
- location of work;
- hours of work expected; and
- termination provisions, including notice periods.

The most common point at which the terms and conditions are set is on appointment. However, they can be reviewed and altered throughout the term of office, provided the correct processes are followed.

#### **How should the process work?**

There should be a transparent procedure for deciding the terms and conditions of the chair and individual non-executive directors. The nominations committee will formulate the terms and conditions relating to a new appointment and agree them, where appropriate, with the governors or the governors' working group before making the appointment.

The nominations committee and, where appropriate, the governors' working group may also wish to consult with the NHS foundation trust's remuneration committee on this process.

Governors should note that the council of governors as a whole at a general meeting must make the final decision on the relevant appointment's terms and conditions, and it could choose to reject the proposals. Similarly, the council of governors as a whole makes the final decision on any revised terms and conditions for existing appointments.

#### **New appointments: how do governors meet their responsibilities?**

All money paid to non-executive directors is taxpayers' money; an NHS foundation trust should therefore ensure that value for public money is obtained.

The nominations committee and, where appropriate, the governors' working group should agree the process for setting terms and conditions as part of the overall appointments process. They should do this after finalising the job description but before the post is advertised.

The factors that the nominations committee, the governors' working group (where appropriate) and, eventually, the council of governors, will need to examine will vary depending on the position. However, central factors will be the:

- time commitment required by the role;
- responsibilities covered by the role; and
- terms and conditions available at similar NHS foundation trusts and other comparable organisations.

In addition to seeking the advice and support available from the NHS foundation trust's own HR specialists, the council of governors may need to take professional advice, particularly on prevailing terms and conditions. The council of governors may also want to look at advice provided by other relevant bodies such as the [Foundation Trust Network](#).

The nominations committee and, where appropriate, the governors' working group may also wish to consult with the NHS foundation trust's remuneration committee during this process.

#### **Involving the remuneration committee**

The remuneration committee is generally concerned with setting the pay of the executive directors and other employees. However, it may be able to provide useful input on matters such as the process, terms and conditions available at comparable organisations, trusted and experienced advisers and relevant performance indicators that may apply to both executive and non-executive directors.

As the remuneration committee is generally composed of non-executive directors, governors should bear in mind that conflicts of interest could arise when they consult the remuneration committee. Governors can manage such potential conflicts by asking the remuneration committee to confine its advice to the process of setting terms and conditions and the use of external advisers.

#### **When should terms and conditions be reviewed or changed?**

It may be necessary to change the terms and conditions of the existing chair, non-executive director or a group of non-executive directors. Such changes will need to be handled carefully and councils of governors may need to take legal advice as a poorly run process could lead to disputes and, possibly, litigation. Changes to existing terms and conditions may be needed when:

- market conditions change – a significant change may mean existing terms and conditions should be reviewed. Even if market conditions do not change significantly, governors should consult external professional advisers to market-test the pay levels and the other terms and conditions of the chair and other non-executive directors at least once every three years; and
- individual responsibilities change – there may be a marked change in the range of an individual's responsibilities or in the time he or she can commit to the role. The governors should take the lead in conducting a review of the chair or other non-executive directors' terms and conditions in the light of any such change. If it seems to merit a significant alteration to the chair's terms and conditions, particularly with regards

to pay, the governors should seek external professional advice (including legal advice) before making any alterations.

#### **Who triggers the review?**

As governors have the statutory duty to decide the remuneration and other terms and conditions of the non-executive directors, the council of governors should determine whether a review is required. This should be an informed decision, made with the advice and support of bodies such as the NHS foundation trust's HR specialists and external professional advice (where market conditions have changed), the chief executive (where a chair's responsibilities have changed) or the chair (where individual non-executive director responsibilities have changed).

#### **How will the final decision be made?**

Any new or changed set of terms and conditions for the chair or other non-executive directors will require a decision by the council of governors at a general meeting. This meeting should be informed by a report (including recommendations) of either the nominations committee or, where appropriate, the governors' working group.

When terms and conditions are revised in relation to a new appointment, the council of governors' decision on them should form part of the appointment decision.

The terms and conditions of the NHS foundation trust's chair should be made fully transparent in the annual report.

### **5.4 Removing the chair and other non-executive directors**

Removal of the chair or other non-executive directors is a very serious step and the council of governors must ensure that a fair, rigorous, lawful and transparent process is in place.

#### **What are the possible reasons for removal?**

Governors will appreciate that removing the chair or other non-executive director is only likely to be appropriate in very limited and particular circumstances. Governors must clearly understand the potential reasons which may lead to a removal decision before embarking on the removal process.

Possible reasons for removal will depend on the particular circumstances. These may include, but are not limited to:

- gross misconduct or a request from the board of directors for the removal of a particular non-executive director;
- the chair losing the confidence of the board of directors or governors; or
- severe failure by the chair to fulfil their role.

#### **What is the process for removal?**

The council of governors should only exercise its power to remove the chair or other non-executive director as a last resort. The removal should not take place unless the governors, other non-executive directors (in particular the chair and senior independent director if he or she is not the subject of the process) and the chief executive, where a chair is concerned,



have had the opportunity to put forward their views on the basis of the available evidence. A suggested process is set out below, followed by further detail on some of the steps outlined.

**Figure 5: Key stages for the removal of a chair or other non-executive director**



### **Investigation, advice and consultation**

The first step in the process to remove a chair or other non-executive director is likely to be a thorough investigation of the facts and concerns. The nominations committee, with appropriate representatives from the council of governors, should then investigate the matter, including any allegations made against the individual. The NHS foundation trust may decide that an independent investigation is warranted under certain circumstances and this should be determined by the trust alone.

This investigation should include consideration of the views of key personnel within the NHS foundation trust. Before the subsequent confidence vote, the council of governors should discuss the matter with:

- The chief executive – where the chair is concerned.
- The other non-executive directors, in particular the senior independent director (where he or she is not the individual under scrutiny), and the chair – where other non-executive directors are concerned.

Governors should note that under the 2012 Act, for the purpose of obtaining information about the trust's performance of its functions or the directors' performance of their duties (including deciding whether to propose a vote on the trust's or directors' performance), they may require one or more of the directors to attend a meeting to discuss this. However, the decision on whether to hold a confidence vote is one for the council of governors. Legal advice on the legality of any removal and the process for it should be sought throughout.

The council of governors may find the annual performance appraisal process helpful when considering the removal of the chair or other non-executive directors.

### *Reporting the findings*

A senior representative of the nominations committee should present the findings of the investigation and consultation to the council of governors. The council of governors must ensure all individuals are given an adequate opportunity to respond to any allegations made.

### **Vote of no confidence**

Only once the investigation has been properly undertaken would a vote of no confidence in the individual by a majority of the council of governors be required. This will not in itself result in the removal, but will start the formal process for the removal. When, following an

investigation, a vote of no confidence in the chair is being considered by the council of governors, the lead governor should directly inform Monitor, through the NHS foundation trust's relationship manager.

### **Suspension**

As part of the standard terms of appointment of chairs and non-executive directors, while an investigation process has been set in train by the council of governors, the chair or other non-executive director(s) in question would be expected to be restricted to attending the trust only for formal board and committee meetings. The individual would effectively be suspended from other activities within the role, pending the investigation and consultation into them.

The council of governors may wish to consider whether it can and should suspend the chair while investigation and consultation are carried out. The governors may consider this appropriate in circumstances where:

- there is a potential risk to patients or staff;
- the council of governors deems that an individual may disrupt an investigation; or
- there is an allegation of fraud.

Governors may need to seek legal advice on whether there is a power to suspend, whether suspension is appropriate and the terms (including the length) of any suspension before they decide to suspend.

### **How will the final decision be made?**

If the council of governors is satisfied that a full and proper process has been followed, it should call for a full meeting of the council of governors to vote on the matter. If it is in any doubt about the process, it should seek clarification and remedy any deficiencies before voting. Removal requires the approval of three-quarters of the members of the whole council of governors and not just those who attend the meeting.

### **What happens when Monitor removes a chair or other non-executive director?**

Following a breach of an NHS foundation trust's licence, circumstances may arise that require Monitor to exercise its statutory powers to suspend or remove a chair or other non-executive director. Under such circumstances, Monitor's statutory powers take precedence over the powers that may be exercised by the council of governors.

For further information on Monitor and how it may exercise its powers, governors can refer to the *Compliance Framework 2013/14* available on Monitor's website. Please note: during 2013/14 the *Risk Assessment Framework* will replace the *Compliance Framework* in the areas of Monitor's financial oversight of providers of key NHS services (not just NHS foundation trusts) and the governance of NHS foundation trusts.

### **What are the next steps following removal?**

In the event that removal takes place, the council of governors will need to make a new appointment to replace the removed individual. A description of the reasons for, and process of, removal will need to be set out in the NHS foundation trust's next annual report.

## Chapter 6: Approving the appointment of the chief executive

*This chapter looks at the role of governors in appointing the chief executive of an NHS foundation trust. It covers:*

- *factors to consider when deciding whether to approve an appointment; and*
- *what to do if you decide not to approve an appointment.*

### **What are the legal requirements?**

The 2006 Act says: "The appointment of a chief executive requires the approval of the council of governors".

### **What does "approval" mean?**

The non-executive directors, including the chair, are responsible for appointing or removing the chief executive. The council of governors has to approve that decision and can veto the appointment of a particular chief executive if there are legally sound reasons, including on the role scope or description. Note that this does not mean that the council of governors **appoints** the chief executive.

The *Code of Governance* states that governors should decide whether to approve a candidate put forward for appointment by a committee of the chair and non-executive directors at the next scheduled general meeting of the council of governors. If a majority of governors attending the meeting approves the appointment, it can go ahead. In rare cases, the council of governors may decide not to approve the candidate but must give legitimate, factual and legally sound reasons for withholding its approval.

### **Timing**

Typically the council of governors meets as a full council only four or five times a year. This may mean a delay of two to three months between the board's decision to appoint and the general meeting of the governors where approval is discussed. Boards can reduce or eliminate such delays by carefully managing the appointment process and keeping governors informed of the timetable, or by holding an additional meeting of the council of governors. An offer made by the board of directors to a potential chief executive in the interim should be stated as being subject to the approval of the council of governors, as required by law.

### **What should the governors consider before making a decision?**

Table 4 (see following page) sets out the three main areas for a council of governors to consider.

**Table 4: Main areas for governors to consider before approving the appointment of a chief executive**

Law and guidance	Process	Proposed candidate
<p>Before the process of approving the appointment of a chief executive starts:</p> <ul style="list-style-type: none"> <li>• inform governors of constitutional requirements; and</li> <li>• inform governors of skills requirements and best practice advice such as the <i>Code of Governance</i>.</li> </ul>	<p>Consult the governors on the appointment process and give them the opportunity to endorse this before it starts.</p> <p>Involve governors in the appointment process so they can give their perspective to the council of governors when it considers approving the final candidate. It will also help to give the council of governors a clear understanding of how the process worked.</p> <p>Ensure the governors are satisfied that the various stages of the appointment process followed by non-executive directors meet the required standard. For example, they should consider the use of advertisements, the criteria for selection and how selection was carried out.</p>	<p>Demonstrate fully how the proposed candidate's skills and experience meet the agreed role and person specification in the report to the governors from the selectors.</p> <p>Involve governors in the selection process so they can give their first hand opinions of the final candidate to the council of governors.</p>

The council of governors should expect a full report from the chair, non-executive directors or appropriate committee regarding the three points above. However, recognising that the legal responsibility to make an appointment rests with the non-executive directors, the council of governors should not withhold its approval lightly.

**What if the council of governors does not give approval?**

If the council of governors does withhold approval, it must justify its reasons to the chair and the other non-executive directors, bearing in mind that its decision is likely to have a range of consequences for the NHS foundation trust. The council should take care to ensure that reasons are legitimate, factual and legally sound.

The non-executive directors and council of governors must work together to avoid a deadlock by sharing concerns as early as possible. Trust boards can make it less likely that governors will withhold approval by communicating with them and involving them throughout the appointment process.

If the council of governors rejects a candidate, the non-executive directors may put forward the same candidate for approval if they can assure the council of governors that its concerns have been addressed. Alternatively, the non-executive directors may decide to seek a new candidate. In either case, the process, the decision and the reasons for that decision should be set out in the NHS foundation trust's annual report.

## Chapter 7: Appointing and removing the NHS foundation trust's external auditor

*The external auditor of an NHS foundation trust has important duties concerning the trust's annual accounts. This chapter sets out the governors' role in relation to the NHS foundation trust's external auditor. This chapter covers:*

- *what the auditor does;*
- *who the auditor can be; and*
- *appointing and removing the auditor.*

### 7.1 Background

#### What are the legal requirements?

The 2006 Act says that every NHS foundation trust must have an auditor that is appointed by the council of governors. The law states that it is for the council of governors to appoint or remove the auditor at a general meeting of the council.

That means the whole council of governors, rather than, for example, a committee or a working group, must appoint or remove the auditor.

Governors will need to do a lot of work to make sure they choose the right external auditor and monitor their performance. However, they are supported in this task by the audit committee, which provides information to the governors on the external auditor's performance as well as overseeing the NHS foundation trust's internal financial reporting and internal auditing.

#### The role of the audit committee

The audit committee is responsible for monitoring and reviewing matters including the integrity of financial statements of the NHS foundation trust, its internal financial controls and internal audit function.

The audit committee must consist of non-executive directors. The *Code of Governance* states that the committee should have at least three independent non-executive directors and that at least one member of the audit committee should have recent and relevant financial experience.

In order to support the underlying statutory duty of choosing the right external auditors, the *Code of Governance* states that the audit committee should report to the council of governors. The reports should:

- identify any matters relating to the external auditor where it considers that action or improvement is needed; and
- recommend what steps to take.

The governors will need to consider such reports closely, particularly in fulfilling their duty to hold the non-executives to account for the performance of the board.

The governors will also want to look at Monitor's *Audit Code for NHS Foundation Trusts* (the *Audit Code*), especially the criteria for auditors that it prescribes.

### **What does the auditor do?**

The auditor has statutory duties to ensure that:

- the accounts of the NHS foundation trust are prepared in accordance with all relevant directions set by Monitor and any other statutory provisions;
- proper practices are observed in compiling the accounts; and
- the NHS foundation trust is using its resources economically, efficiently and effectively.

Further details on the auditor's role are set out in the *Audit Code*.

### **Who can be the auditor?**

When an NHS foundation trust is authorised, it will have in post an auditor appointed by the Audit Committee of the NHS trust. This auditor will remain in post until the council of governors of the new NHS foundation trust has had a chance to discuss appointing a replacement.

The new NHS foundation trust is free to appoint whichever auditor it considers the most appropriate. However, to avoid having no auditor in place the new trust and the incumbent auditors must agree an engagement letter for the period before a new auditor is appointed, or the old one reappointed.

The auditor can either be an individual, or from a firm of auditors or other professional firm. However, the auditor (or in the case of a firm, each of its members) must be a member of one of the professional bodies specified in law (Audit Commission Act 1998), as below:

- a) the Institute of Chartered Accountants in England and Wales;
- b) the Institute of Chartered Accountants of Scotland;
- c) the Association of Certified Accountants;
- d) the Chartered Institute of Public Finance and Accountancy;
- e) the Institute of Chartered Accountants in Ireland; and
- f) any other body of accountants established in the United Kingdom and for the time being approved by the Secretary of State for this purpose.

The *Audit Code* sets out the particular criteria that an auditor must meet, not only on appointment but throughout its term as auditor. The auditor must:

- have an established and demonstrable standing within the health care sector and show a high level of experience and expertise – the work is specialised, so general audit experience is not enough to meet this standard;
- comply with the *Audit Code*; and
- subject the audit to internal quality control procedures that are sufficiently robust to test whether the audit work complies with the *Audit Code*.

If the auditor fails to meet, or believes it will not be able to meet, the criteria set out in the *Audit Code* at any point during its appointed term, the auditor must resign.

Governors need to consider when to change the team at the auditor's firm because a team that has been in place for too long may no longer be sufficiently independent from the NHS foundation trust. Governors can seek advice from the Auditing Practices Board (APB) on when to rotate teams, informed by APB ethical standard 3.

### Annual process

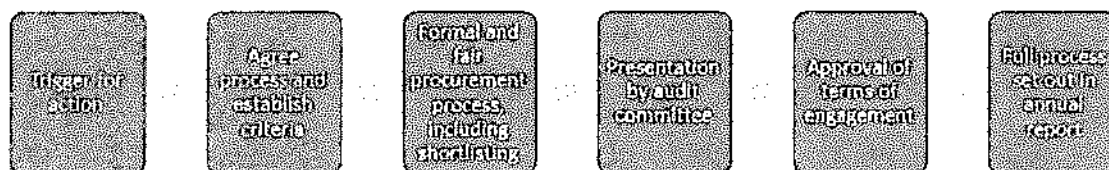
The audit committee should make a report to the council of governors on the auditor when the annual audit is completed.

This report should assess whether the auditor's work is of a sufficiently high standard and its fees are reasonable.

The audit committee must make a recommendation to the council of governors on retaining or removing the auditor. The council of governors should then consider whether to retain or remove the auditor.

## 7.2 Appointing the auditor

**Figure 6: Key stages for appointing the auditor**



### Trigger for action

The impending end of the existing auditor's contract term will trigger a new appointment process, whether or not the existing auditor is seeking reappointment.

Governors also have the power to remove an existing auditor and, in certain situations, an auditor can or should resign. In either event, governors will need to make a new appointment.

### Agree process and establish criteria

The council of governors should take the lead in agreeing with the audit committee the criteria for appointing, reappointing or removing auditors. As with all appointments or reappointments, the procedure must be formal, rigorous and transparent.

The audit committee will run the process but the final decision on any appointment rests with the council of governors. Having established objective criteria, the audit committee should:

1. agree with the council of governors a clear process for nominating a new auditor or reappointing the existing one, including a timetable showing the deadline by which a new appointment should be made; and



2. prepare a specification defining the role and capabilities required, including the necessary qualifications, skills and experience, and agree the specification with any governors' audit working group or similar.

### **Procurement process**

The audit committee should run a formal procurement process to obtain the best candidate as fairly and transparently as possible. The process may vary depending on the NHS foundation trust's particular procurement rules but it must be within procurement law. This is complex and the audit committee and the governors' audit working group are likely to need legal advice before embarking on a procurement process.

### *Re-appointment*

If the audit committee and the governors' audit working group have followed a correct process and the existing auditor meets the appropriate criteria, then the existing auditor may appear on the shortlist of final candidates. The same criteria should be applied to all those that express an interest in becoming the auditor of the NHS foundation trust.

### *Shortlist*

The audit committee should draw up a shortlist of at least two appointable candidates in conjunction with the governors' audit working group.

### **Presentation by the audit committee**

The audit committee and any governors' audit working group should present to the council of governors:

- the procurement process they have followed;
- the results of the procurement process; and
- recommendations.

The recommendations should describe in full the shortlisted candidates and assess their relative strengths and weaknesses. The appointment must be based on merit and objective criteria. The committee should also recommend the preferred candidate and set terms of engagement for the external auditor.

### **How will the council of governors make a final decision?**

The council of governors should then make a final decision in line with its statutory obligations.

If the council of governors chooses to make an appointment, the audit committee will need to approve the auditor's terms of engagement. The council of governors and the audit committee should consider in particular how long the appointment should last. Best practice is to appoint an auditor for a period which allows it to develop a strong understanding of the NHS foundation trust, normally three to five years (see "Who can be the auditor?" above).

Should the council of governors feel unable to make an appointment, for example, because it is unwilling to accept the audit committee's recommendations or believes the procurement process was flawed, then the audit committee and the governors' audit working group must set to work again at speed. The law requires the NHS foundation trust to have an auditor at

all times, so they should adhere to the appointment timetable they will have drawn up at the start of the process. However, they may need to consider extending the incumbent auditor's contract to ensure that the trust is never without an auditor.

### Next steps

In any event, the full process must be set out in the NHS foundation trust's annual report. In particular, if the council of governors does not accept the audit committee's recommendation, the board of directors should include in the annual report a statement from the audit committee explaining its recommendation and the reasons the council of governors took a different position.

## 7.3 Removing the auditor

Removing the auditor is a very serious step and the council of governors must follow a rigorous and transparent process in taking it.

### What are the possible reasons for removing the auditor?

The council of governors will recognise that removing the auditor is rarely likely to be appropriate, particularly as the auditor plays an independent role within the NHS foundation trust.

If the auditor demonstrably does not meet the criteria set out in the *Audit Code* the governors may have grounds for removal, although the governors must, of course, clearly understand those grounds before they embark on the removal process.

### What is the process?

The council of governors should only exercise its power to remove the auditor after exhausting all other means of resolving any dispute. If it cannot resolve the issue, we suggest it pursues the following process.

**Figure 7: Process for governors to remove the auditor**



### Proposal

The council of governors should put together a proposal to consider removing the auditor. This will not necessarily result in removal, but will start the formal process.

### Investigation, advice and consultation

The audit committee should investigate the issue, including allegations made against the auditor, if any. The investigation should consider the views of key personnel within the NHS foundation trust, including the NHS foundation trust's finance director and his or her staff. The audit committee should seek legal advice on the legality of the removal process and any eventual removal throughout the process.

**Report**

The audit committee should present the findings of the investigation and consultation to the council of governors. The council of governors must ensure that the auditor is given adequate opportunities to respond to any allegations.

**Making a final decision**

Once the council of governors is satisfied that a full and proper process has been followed, it should vote on whether to remove the auditor. If governors have any doubts at all about the process, they must remedy any deficiencies in the process before voting. A majority of the council of governors must vote to remove the auditor at a general meeting before a removal can go ahead.

**After the auditor's removal**

When the council of governors ends an auditor's appointment in disputed circumstances, the chair of the NHS foundation trust should write to Monitor giving the reasons for the decision. After a removal, the NHS foundation trust will need to appoint a new auditor. The removal process and the reasons for it will also need to be set out in the NHS foundation trust's annual report.

## Chapter 8: Receiving the NHS foundation trust's annual accounts, any auditor's report on them, and the annual report

*The council of governors will need to see a number of regular reports to keep informed about the NHS foundation trust. This chapter identifies the reports the council of governors must receive to meet the statutory requirements. It covers:*

- *the role of the governor in receiving these documents; and*
- *governors' duties to provide internal feedback.*

### **What are the legal requirements?**

The 2006 Act, as amended, says: "The following documents must be presented to the council of governors... at a general meeting, and also by at least one member of the board of directors of the corporation at the annual members' meeting NHS foundation trusts may also combine the annual members' meeting with a meeting of the council of governors.

- (a) the annual accounts
- (b) any report of the auditor on them; and
- (c) the annual report".

Monitor's *NHS Foundation Trust Annual Reporting Manual (Annual Reporting Manual)* states that these documents should be presented at the annual general meeting of the council of governors.

### **What are these documents?**

Further details about the annual report and accounts of an NHS foundation trust, and any report on the accounts from the NHS foundation trust's auditor, are in the *Annual Reporting Manual* available on Monitor's website.

### **Accounts**

The NHS foundation trust must keep accounts, prepare annual accounts for each financial year, and comply with directions from Monitor concerning any aspect of those accounts.

#### *Annual report and accounts*

The *Annual Reporting Manual* sets out the requirements for the content and format of the annual report and accounts. The accounts will include:

- a statement of the accounting officer's responsibilities;
- the annual governance statement;
- auditor's opinion;
- main statements; and
- notes.

The annual report will include, at a minimum:

- a directors' report, including a management commentary;
- a remuneration report;
- the disclosures set out in the *Code of Governance*; and
- other disclosures in the public interest.

In addition, the annual report must include a report on the quality of care the NHS foundation trust provides. The quality report should contain an update on the quality of care, incorporating a statement outlining the current level of quality and priorities for improving it, signed by the trust's chief executive. The report will also summarise the trust's performance against quality indicators selected by the trust in three key areas:

1. patient safety;
2. clinical effectiveness; and
3. patient experience.

Further details on the content of these reports are in the *Annual Reporting Manual*, which governors are encouraged to read.

The annual report must also include details of all occasions when the council of governors has exercised its powers to require a director to attend a meeting (see page 19).

#### **Auditor's report on the accounts**

When the auditor has finished auditing the accounts, it must enter on them:

- a certificate that it has completed the audit in accordance with the relevant law; and
- an opinion on the accounts.

The auditor should address the certificate and opinion to the council of governors. The certificate must confirm that the audit has been completed in accordance with the relevant law. If the auditor has done this but is nevertheless not satisfied that the process fully meets standards set out in the *Audit Code*, then it must say so by qualifying the certificate.

#### **Approval of the annual report and accounts**

The annual report and accounts must be formally approved by the board of directors. Once approved, the auditor will sign its opinion on the accounts (in accordance with the *Audit Code*). The auditor will need to see the annual report before signing its opinion on the accounts.

NHS foundation trusts are required to lay before Parliament their annual report and accounts and any auditor's report on them, should there be one. The *Annual Reporting Manual* sets out when to do this.

**Table 5: Timescales for the production of the annual report and accounts**

July	July/August	Within a reasonable period from the end of the financial year
Annual report and accounts laid before Parliament.	Date of the annual general meeting of the council of governors advertised.	Annual general meeting takes place. Annual report and accounts are presented at the meeting.

### Quality accounts and governors

It is important to encourage governors to participate in:

- identifying and prioritising quality indicators and quality priorities for the NHS foundation trust in the coming year (as part of involving governors in formulating the forward plan); and
- presenting the final quality report or account after the financial year has ended (which helps them fulfil their duty to hold the non-executive directors to account for the performance of the board).

This approach to involving governors in upholding quality may differ from the approach taken in NHS foundation trusts. A note on the timetable for involving governors following the new approach appears below (in “What is the role of the governors?”). NHS foundation trusts are likely to adapt this guide to meet their own internal reporting timetables but it gives an overview of the main tasks governors may take on concerning the quality report and accounts.

Monitor’s guidance, *Detailed Guidance for External Assurance on Quality Reports 2012/13* (updated annually) sets out detailed guidance for NHS foundation trusts and their auditors to enable them to carry out the external assurance engagement on the quality reports.

Governors may also wish to read the Foundation Trust Network publication *Making the Most of Your Quality Accounts*.<sup>7</sup>

### What is the role of the governors?

As noted above, the annual report and accounts and any auditor’s report on the accounts must be presented at a meeting of the council of governors. The *Annual Reporting Manual* indicates this will be the annual general meeting.

This meeting should be convened within a reasonable period from the end of the financial year in question but not before the annual report and accounts have been laid before Parliament.

The *Annual Reporting Manual* suggests placing an advertisement in the local media not less than 14 days before the date of the meeting, stating:

- the time, date and location of the meeting; and
- how copies of the annual report and accounts (or annual report and summary financial statements) of the NHS foundation trust may be obtained on request before the meeting.

### What does “presented to the council of governors” mean?

One of the directors presents the documents listed above to the council of governors to inform them about the NHS foundation trust’s performance. Governors then have an opportunity to comment on the documents but cannot make changes to them.

The council of governors must understand the information in these documents, for example, on the performance of the chair or the other non-executive directors. This will ensure it has

<sup>7</sup> You will need to register with the Foundation Trust Network to use this link.

fulfilled its other statutory duties, for instance, to provide informed feedback to the board of directors and to inform external stakeholders (including any that they represent) on how the NHS foundation trust is performing. Governors should be permitted to ask additional questions on NHS foundation trust performance as appropriate.

The governors will base their own views of how the NHS foundation trust is performing on the performance information in the annual report and accounts and the response to their subsequent questions, making their understanding of those documents an essential part of how governors collectively can hold the board of directors, and specifically the non-executive directors, to account.

#### **Internal feedback**

When a director presents the annual report and accounts to the council of governors, this presents a good opportunity for the board of directors to brief the council of governors on the overall performance (financial and otherwise) of the NHS foundation trust in the previous year.

The council of governors should provide feedback to the board of directors based on its view of the overall performance of the board. The chair is responsible for arranging for the governors to give this internal feedback.

#### **External stakeholders**

The council of governors should also explain to the NHS foundation trust members, and the stakeholder organisations that appointed them, how the trust has performed over the previous year. It may do this near the time it receives the annual report and accounts.

## Chapter 9: Preparing the forward plan

*The council of governors should be involved in strategic planning. This chapter covers:*

- *what the forward plan is;*
- *the governors' role in strategic planning; and*
- *what the board of directors does in relation to governors' input.*

### **What are the legal requirements?**

The 2006 Act, as amended, requires NHS foundation trusts to give Monitor forward planning information for each financial year, prepared by the board of directors. In preparing the forward plan, directors must have regard to the views of the council of governors. This means that governors should have the opportunity to discuss the plan, but it can be implemented without their approval.

### **What is the forward plan?**

Monitor requires each NHS foundation trust to submit an annual plan including forecast financial performance, details of any major risks to compliance with their licence and how the NHS foundation trust intends to address these risks.

Further advice on preparing and submitting the annual plan is available on [Monitor's website](#); we update this every year. The information in the annual plan includes:

- commentary on the strategic overview for the NHS foundation trust, changes to previous forecasts, risk analysis and membership plans;
- a membership report;
- the Corporate Governance Statement and other statements required by the licence; and
- financial projections.

### **What is the role of the governors?**

The *Code of Governance* states that governors can "expect to be consulted on the development of forward plans for the trust and any significant changes to the delivery of the trust's business plan".

The approach to strategic planning taken by boards varies considerably. This also reflects the variation in the way in which councils of governors are involved.

The forward plan incorporates both operational and strategic information. The council of governors' role is to ensure that the interests of members of the NHS foundation trust, and of the public, are considered when the NHS foundation trust proposes strategic developments. It may perform this role in various ways.

### **Canvassing the opinions of members and of the public**

Governors should seek to canvass the opinions of members and of the public (and, for appointed governors, the body they represent), to make sure a range of opinions inform the planning process. They might do this by, for example, holding constituency meetings or open days, putting questionnaires on the trust website, or simply by talking to staff and the



public throughout the year to understand what they would like to see the trust achieve in the future. However, this is for the trust and governors to agree locally.

#### **Discussing planning priorities with the board of directors**

Governors must feed back the views of members of the NHS foundation trust, and of the public, to the board of directors. NHS foundation trusts have so far found a variety of ways to do this.

#### **Involving governors in strategic development plans**

After the board of directors has approved a specific initiative and incorporated it into the trust's forward plan, governors should be kept informed of progress with implementation to make sure that the interests of members of the NHS foundation trust, and of the public continue to be represented.

To be clear, this does not mean involving governors in the operational planning of each initiative developed by the trust, rather that the views of the governors and considerations of members and of the public are discussed by the board when undertaking such planning.

Please see Chapter 11 for further details of the involvement of governors in taking decisions on proposed increases in non-NHS income.

#### **What should the board of directors do in response to governors' input?**

Forward planning is the responsibility of the board of directors and they are not obliged to incorporate all the governors' comments into the final forward plan. However, the board of directors must pay attention to the council of governors' views. The amount of weight directors give to the governors' views is up to the directors, but they must, at least, consider them.

The Monitor website provides further advice on how the annual planning process may incorporate the views of governors; this is updated annually.

#### **Informing stakeholders**

Once the NHS foundation trust has submitted its forward planning information to Monitor, the council of governors should inform stakeholders of the NHS foundation trust's forward planning, and the reasoning behind it.

## Chapter 10: Taking decisions on significant transactions, mergers, acquisitions, separations and dissolutions

*Governors are tasked with approving significant transactions, mergers, acquisitions, separations and dissolutions proposed for the foundation trust by the directors. This chapter examines:*

- *the legal requirements;*
- *significant transactions;*
- *mergers, acquisitions, separations and dissolutions;*
- *what governors are asked to take decisions on;*
- *how they might take such decisions in practice;*
- *how the board of directors should support governors in their duty;*
- *how to inform stakeholders; and*
- *what happens to the council of governors after a merger or acquisition.*

### **What are the legal requirements?**

Under the 2012 Act:

- *More than half of the members of the full council of governors of the trust voting need to approve the trust entering into any significant transaction, as specified in the trust's constitution. This means more than half of the governors who are in attendance at the meeting and who vote at that meeting.*
- *More than half the members of the full council of governors must approve any application by the trust to merge with or acquire another trust, separate the trust into two or more new NHS foundation trusts or to be dissolved. This means more than half of the total number of governors, not just half the number that attends the meeting at which the decision is taken. If the other party to the proposed transaction is also an NHS foundation trust, more than half the governors of that foundation trust must also approve the transaction.*

This means that trusts will need to help governors by providing appropriate information on proposed decisions and, consistent with the general requirement placed on NHS foundation trusts, by taking steps to ensure that the governors are equipped with the skills and knowledge they require in their capacity as governors. Governors will need to arrange a vote of the full council and to inform the directors of the outcome of this vote.

Voting procedures, including any rules on the Chair's vote, casting votes or abstentions should be determined locally and you would normally find the details of these in your trust's constitution.

### **What are "significant transactions"?**

NHS foundation trusts are permitted to decide themselves what constitutes a "significant transaction" and may choose to set out the definition(s) in the trust's constitution.

Alternatively, with the agreement of the governors, trusts may choose not to give a definition, but this would need to be stated in the constitution. Examples of a definition might include any proposed contract valued over a certain monetary value or over a certain

percentage of the trust's annual turnover. Or trusts could choose to define what constitutes a "significant transaction" in non-monetary terms.

Appendix F of Monitor's *Compliance Framework 2013/14* outlines what Monitor uses to define "significant transactions" for the purpose of risk ratings, although this is an example only and the trust is not required to apply the same definition within its own constitution. Monitor's definition is not intended to change. However it may well be different to the definition employed by individual trusts.

**Table 6: Mergers, acquisitions, separations and dissolutions – definitions and regulatory requirements**

Type	Definition	Regulatory requirements
Mergers	A "merger" refers to a merger of an NHS foundation trust with another NHS foundation trust or with an NHS trust.	<p>The amendments to the 2006 Act revised the requirement for Monitor to approve mergers between an NHS foundation trust and another NHS trust, or between two NHS foundation trusts. NHS foundation trusts that plan to merge will still have to make an application to Monitor. However, our role will be limited to ensuring the necessary steps in the process have been followed, including that the appropriate approval by the council of governors has been obtained.</p> <p>Monitor is required to grant the application to effect the change provided it is satisfied that the necessary steps have been undertaken. Support of the application by the Secretary of State is required if one of the parties is an NHS trust.</p> <p>Mergers between two or more NHS foundation trusts or between one NHS foundation trust and an NHS trust may be deemed to be "relevant mergers" and would then be subject to review by the Office of Fair Trading (OFT). Please see <a href="#">here</a> for further details of the respective roles of Monitor, the OFT and the Competition Commission in this regard.</p>

Acquisitions	<p>An "acquisition" refers to an application by an NHS foundation trust to acquire another NHS foundation trust or an NHS trust.</p>	<p>A joint application must be made to Monitor by the intended acquirer (an NHS foundation trust) and the acquiree (an NHS foundation trust or an NHS trust).</p> <p>The application will be made following our review of the transaction and will include, amongst other documents, written confirmation from each NHS foundation trust involved in the transaction that the governors have approved making the application by the requisite majority. The application must be accompanied by the proposed constitution of the acquirer which has been amended on the assumption that the acquisition will proceed.</p> <p>Secretary of State approval is required if one of the parties to the transaction is an NHS trust.</p>
Separations	<p>A "separation" refers to an NHS foundation trust separating into two or more new NHS foundation trusts.</p>	<p>An NHS foundation trust planning to separate into two or more new NHS foundation trusts must apply to Monitor for the dissolution of the trust and the establishment of two or more new NHS foundation trusts.</p> <p>Our role is limited to ensuring that the necessary preparatory steps have been taken, including approval of the majority of governors of the NHS foundation trust. If Monitor is satisfied that the necessary steps have been taken, we are required to grant the application effecting the change.</p>
Dissolutions	<p>An NHS foundation trust may make an application to Monitor for the trust to be "dissolved". This might happen if, for example, the NHS foundation trust is being acquired by another NHS foundation trust.</p>	<p>If an NHS foundation trust wishes to dissolve, it must make an application to Monitor.</p> <p>Monitor must grant the application if we are satisfied that the applicant NHS foundation trust has no liabilities and that such steps as are necessary to prepare for the dissolution have been taken, including obtaining the approval of the majority of the council of governors.</p>

Monitor's *Compliance Framework* sets out the criteria for transactions that need to be reported to us. While this will be replaced by the *Risk Assessment Framework* during 2013/14, we will continue to provide guidance.

Monitor and the Department of Health have also jointly published a *Transactions Manual*. This provides further information for NHS foundation trusts and commissioners on the management and governance of major corporate transactions.

Further merger advice can be found in Monitor's document *Applying for a Merger involving an NHS Foundation Trust: Guide for Applicants*; additional documentation will become available in due course.

Further guidance on evaluating risk in investment decisions is available from Monitor's document *Risk Evaluation for Investment Decisions by NHS Foundation Trusts*, which is on our website.

#### **What are governors asked to take a decision on?**

The 2006 Act, as amended, states that the trust's constitution must provide for all the powers of the corporation to be exercisable by the board of directors on its behalf. This means that it must be the decision of the board of directors as to whether a transaction should proceed.

Governors must obtain sufficient information from the board of directors on the proposed transaction(s) to make an informed decision on the significant transaction, merger, acquisition, separation or dissolution.

Governors will recall that their general duties in legislation) are to hold the non-executive directors (individually and collectively) to account for the performance of the board of directors, and to represent the interests of the NHS foundation trust members and the public. With that in mind, governors should assure themselves that the board of directors has followed an appropriate process in deciding to undertake the transaction and that it has taken account of the interests of members and of the public in that process in approving such a transaction.

#### **How might governors take such decisions in practice?**

Directors and governors must agree on a process for governors being asked to approve these transactions to follow. Such a process might include:

- what information governors will be given;
- at what point in the process governors will be asked to approve the transaction(s); and
- how the views of members will be sought and stakeholders kept informed.

The move towards any transaction is likely to take place over a period of time. The 2006 Act, as amended, is clear that Monitor must be satisfied that the necessary steps have been taken, including the approval of more than half of the council of governors. We recommend that as much information is provided to governors as reasonably possible for them to make an informed decision.

Please see the following for a reminder of the respective roles of the directors and governors:

- Executive directors are responsible for bringing forward proposals for the future of the organisation. Directors should provide governors with full information on the proposed transaction, seek to explain to governors why they believe the transaction is necessary and provide evidence to support their view.
- Non-executive directors are responsible for challenging the executives to justify their recommendations, deal with the risks involved and seek assurance that the executives' decisions are the right ones.

- Governors are responsible for satisfying themselves that the board of directors has been thorough and comprehensive in reaching its proposal (that is, has undertaken proper due diligence), and that it has appropriately obtained and considered the interests of members and the public as part of the decision-making process. Provided appropriate assurance is obtained, governors should not unreasonably withhold their consent for a proposal to go ahead.

#### **How should stakeholders be informed?**

Once a final decision has been taken on the proposed transaction and the chair has confirmed that this is not confidential, the council of governors should seek to communicate the result to the trust's members and the public. The trust is likely to need to help governors do this, for example, through the trust's website or at an advertised drop-in session with the governors. The method should be agreed locally.

#### **What happens to the council of governors after a merger or acquisition?**

If two NHS foundation trusts decided to merge, both of the respective boards of directors and councils of governors would be dissolved and one new board and one new council would be formed. New public, staff (and, if applicable, patient, carer and/or service user) electoral constituencies would need to be drawn up for the new council of governors, and elections would need to be held to elect governors to represent them. The newly formed NHS foundation trust would also need to decide from which organisations it wished to draw appointed governors. This would typically be decided by a joint working group of the two former boards.

If an NHS foundation trust acquires another NHS foundation trust, the council of governors of the acquiring trust may remain in place, as that trust will continue to operate as the same entity. The acquiring NHS foundation trust is likely to choose to extend its original public constituency areas to cover the areas served by the acquired NHS foundation trust. New governors will need to be elected to represent these additional public constituency areas. Individuals who served as governors of the acquired NHS foundation trust may stand for election if they are eligible to do so under the constitution.

#### **Governor liability**

We recognise that governors may be concerned that they will be held responsible should such a transaction turn out to be financially or otherwise damaging for the trust. The 2006 Act, as amended, does not make explicit reference to governors' liability in this regard.

Governors' new duty to "hold the non-executive directors, individually and collectively to account for the performance of the board of directors" does not mean that governors are responsible for the decision itself, or the operational detail behind it. Responsibility for a decision remains with the board of directors, acting on behalf of the NHS foundation trust. It is only through the power to make decisions (and therefore not to make decisions) that liability accrues. Assuming governors' decision-making powers are limited to appointing, advising and approving (or disapproving) transactions (as long as proper process has been followed), the potential for liability should be negligible. There is no legal requirement for trusts to provide an indemnity for governors, or insurance to cover their service on the council of governors, although an indemnity or insurance policy is often given, and, if so, is likely to be set out in the trust's constitution.

## Chapter 11: Taking decisions on non-NHS income

*The 2012 Act has given governors decision-making rights concerning non-NHS income. These came into force on 1 October 2012. Issues that we will look at in this chapter include:*

- *the legal requirements concerning this duty;*
- *what non-NHS income includes;*
- *what governors are asked to take decisions on;*
- *how they might take these decisions in practice;*
- *what the board of directors should do to support governors; and*
- *how to inform stakeholders.*

### **What are the legal requirements?**

The 2006 Act, as amended, obliges NHS foundation trusts to ensure that the income they receive from providing goods and services for the health service in England (their principal purpose) is greater than their income from the provision of goods and services for any other purposes (non-NHS income).

NHS foundation trusts are obliged to publish, in their forward plans, information about activities, other than the provision of goods and services for the purposes of the health service in England, that the trust proposes to carry on, and the income it expects to receive from doing so. NHS foundation trusts must also explain the impact of such activities on the delivery of goods and services for purposes of the health service in England.

Where the trust's forward plan contains information about the NHS foundation trust carrying out an activity which is not providing goods and services for the purposes of the health service in England, the council of governors must decide whether it is satisfied that carrying out the activity will not to any significant extent interfere with the trust's fulfilment of its principal purpose or the performance of its other functions. The council of governors also has a duty to notify the directors of its decision.

The 2006 Act, as amended, also requires that where an NHS foundation trust proposes to increase by 5% or more the proportion of its total income in any financial year attributable to activities other than the provision of goods and services for the purposes of the health service in England (including private work) – ie, non-NHS sources – it may do so only if more than half of the members of the council of governors voting approve the implementation of the proposal. For example, governors will be required to vote where an NHS foundation trust plans to increase its non-NHS income from 2% to 7% or more of the trust's total income.

This means that trusts will need to provide governors with appropriate information regarding the proposed change. Governors will need to arrange a vote of the council and must inform the directors of the outcome of the vote.

### **What does non-NHS income include?**

The 2006 Act, as amended, gives no definition of "activities other than the provision of goods and services for the purposes of the health service in England" (ie, non-NHS

income). Trusts will therefore need to decide how they will define this. We would expect directors and governors to discuss this and reach agreement on a definition.

#### **What are governors asked to take a decision on?**

The decisions that governors must take in regard to non-NHS income are set out in the legal requirements above.

#### **How might they take such decisions in practice?**

Governors should recall that their duties are to hold the non-executive directors, individually and collectively, to account for the performance of the board of directors, and to represent the interests of members of the trust as a whole, and the interests of the public.

Governors should therefore consider whether they feel assured that the board has, as part of its decision-making process:

- carried out an effective process to reach its proposal;
- appropriately considered the interests of members of the trust; and
- appropriately considered the interests of the public.

Providing appropriate assurance is obtained, governors should not unreasonably withhold their consent for a proposal to go ahead.

#### **What will the board of directors need to do to support governors?**

The directors must give the forward plan to the council of governors in good time for them to give it due consideration at a council meeting. The directors should also ensure that the governors are provided with any further information they need in order to understand this document, and any proposed increase (by 5% or more) of the proportion of the trust's total income in any financial year from activities other than the provision of goods and services for the purposes of the health service in England (ie, non-NHS income).

Any such proposed increase may well also be a significant transaction for the trust, or indeed, it might result by way of a proposed acquisition of another entity. The directors and governors should decide whether all the voting requirements can be met in a single vote or whether it would be more appropriate to vote separately on the proposed increase in non-NHS income, on the proposed significant transaction and on the proposed acquisition, for example.

The directors should ensure that the governors receive any information they need to make a decision, and should arrange an opportunity for the council of governors to ask them questions about the forward plan. The governors should then consider the document and the answers to their questions and make arrangements for the council to vote on the document. The governors should arrange to inform the directors as soon as practicable on the outcome of the vote.

#### **How to inform stakeholders**

When the final decision has been taken on any proposed change to non-NHS income, and once the chair has confirmed the decision is not confidential, the council of governors should communicate the result to trust members and the public. The trust is likely to need to assist governors in making this communication, for example through a specific area of the



trust's website or at an advertised drop-in session with the trust's governors. The method should be decided locally.

## Chapter 12: Further information

This guide sets out the key statutory responsibilities of the council of governors. However, good practice exists in many other areas. NHS foundation trusts are encouraged to utilise the various networks and information sources available to access best practice and drive continuous improvement.

### Monitor ([www.monitor.gov.uk](http://www.monitor.gov.uk))

All of the Monitor publications mentioned in this guide can be found on our website:

- *Audit Code for NHS Foundation Trusts* (March 2011)
- *Compliance Framework 2013/14* (March 2013)
- *Current practice in NHS foundation trust member recruitment and engagement* (July 2011)
- *Director–governor interaction in NHS foundation trusts: A best practice guide for boards of directors* (June 2012)
- *Enforcement Guidance* (March 2013)
- *The new NHS provider licence* (February 2013)
- *NHS Foundation Trust Annual Reporting Manual 2012/13* (March 2013; this is updated annually)
- *The NHS Foundation Trust Code of Governance* (March 2010, currently being updated)
- *Survey of NHS Foundation Trust Governors 2010/11* (July 2011)

There is information on our website about reviewing annual plans, updated each year.

There is also a section for governors on Monitor's website which provides general information: [www.monitor.gov.uk/governors](http://www.monitor.gov.uk/governors)

Full information on the Panel for Advising Governors can be found at: [www.monitor.gov.uk/governorpanel](http://www.monitor.gov.uk/governorpanel)

The directory of NHS foundation trusts and the register of licence holders (available on our website at [www.monitor.gov.uk/about-your-local-nhs-foundation-trust/nhs-foundation-trust-directory-and-register-licence-holders](http://www.monitor.gov.uk/about-your-local-nhs-foundation-trust/nhs-foundation-trust-directory-and-register-licence-holders)) contains the information about NHS foundation trusts that Monitor has a statutory obligation to provide. This information includes the authorisation, the licence, the list of Commissioner Requested Services, the constitution, the latest annual report and accounts, and any regulatory action that has been taken by Monitor.

### Care Quality Commission ([www.cqc.org.uk](http://www.cqc.org.uk))

The Care Quality Commission (CQC) is the independent regulator for all health and social care services in England. Its strategy for 2013-2016 (*Raising standards, putting people first*) explains its role and purpose.

The CQC's purpose is to make sure health and social care services provide people with safe, effective, compassionate and high-quality care and to encourage care services to improve. Its role is to monitor, inspect and regulate services to make sure they meet fundamental standards of care. The CQC registers all care providers in England, including

NHS foundation trusts, and monitors providers to ensure they continue to meet its standards on an ongoing basis.

It carries out its role by:

- setting standards of quality and safety that people have a right to expect whenever they receive care;
- registering services that meet its standards;
- monitoring, inspecting and regulating care services to make sure that they continue to meet its standards;
- protecting the rights of vulnerable people, including those whose rights are restricted under the Mental Health Act;
- listening to and acting on people's views and experiences of the care they receive;
- challenging all providers, with the worst performers getting the greatest attention;
- making fair and authoritative judgements, supported by the best information, evidence and data;
- taking appropriate action if care services are failing to meet its standards;
- carrying out in-depth investigations to look at care across the system;
- reporting on the quality of care services, publishing clear and comprehensive information, including performance ratings to help people choose care; and
- involving people who use care services in its work, working with local groups, partners in the health and social care system and the public to make sure people's views and experiences of care are at the centre of what it does.

The CQC's judgements about the safety and quality of care play an important part in decisions made by NHS England and local commissioners on which services to buy and protect, and in Monitor's decisions on whether an NHS foundation trust is well run on behalf of patients. It has a range of enforcement powers to address failure where services are not meeting standards. In the case of an NHS foundation trust failing to meet standards, the CQC will liaise with Monitor and, taking account of their respective powers, we will work together to ensure the standards are met.

#### **HM Treasury ([www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk))**

HM Treasury is responsible for formulating and implementing the Government's financial and economic policy. Its publication *Managing public money* is relevant to accounting officers, providing guidance on how to handle public funds of all kinds properly.

#### **Foundation Trust Network ([www.foundationtrustnetwork.org](http://www.foundationtrustnetwork.org))**

The Foundation Trust Network (FTN) is the membership organisation for NHS public provider trusts. The FTN is the single voice for NHS public providers, recognised for its effective lobbying and influence within government, as a promoter of shared learning, and as a provider of exceptional support and development for its members. The FTN is also responsible for delivering *GovernWell*, a national governor training programme which was sponsored by the NHS Leadership Academy.

#### **Foundation Trust Governors' Association ([www.ftga.org.uk](http://www.ftga.org.uk))**

The Foundation Trust Governors' Association (FTGA) is the national voice for foundation trust governors. It aims to empower governors by supporting and developing them and lobbying on their behalf. Its development events regularly attract high-profile speakers while

its popular publications help governors to understand their roles and the context in which they operate. The FTGA works closely with Monitor, the FTN, the CQC and the Department of Health (DH) to ensure a fair share of voice for governors.

#### **Sources of further information on your NHS foundation trust's governance arrangements**

- Your trust's provider licence
- Your trust's constitution
- Trust secretary (or equivalent)
- Membership manager (if you have one)
- Fellow governors
- Your trust's website

#### **Sources of further information on your NHS foundation trust's performance**

Financial information:

- Monitor's financial risk ratings. This may change following the introduction of the *Risk Assessment Framework*.

Clinical performance:

- Care Quality Commission
- Hospital guides, for example [Dr Foster](#)
- Department of Health

Governance information:

- Monitor's governance risk ratings. This may change following the introduction of the *Risk Assessment Framework*.

Governors of NHS foundation trusts may refer to the [Panel for Advising Governors](#) any questions regarding whether their trust has failed or is failing to act in accordance with its constitution or with Chapter 5 of the 2006 Act where: governors are not able to obtain an answer to a relevant question through internal discussion; more than half of the members of the council of governors voting approve the referral; and the panel agrees that the question meets its criteria. More information is available on page 24.

## Glossary

### **Audit Committee**

A trust's own committee monitoring its performance, probity and accountability.

### **Auditor**

The internal auditor helps organisations (particularly boards of directors) to achieve their objectives by systematically evaluating and proposing improvements relating to the effectiveness of their risk management, internal controls and governance processes.

The external auditor gives a professional opinion on the quality of the financial statements and report on issues that have arisen during the annual audit.

### **Auditing Practices Board (APB)**

The APB is part of the Financial Reporting Council. It is committed to leading the development of auditing practice in the UK to: establish high standards of auditing; meet the developing needs of those who use financial information; and ensure public confidence in the auditing process.

### **Carer**

Someone who gives a patient or service user regular support, but who is not paid or employed by the statutory services. They can be a neighbour, friend, family member or partner.

### **Clinical Commissioning Groups (CCGs)**

The new groups of commissioners introduced by the 2012 Act. Following the abolition of Primary Care Trusts (PCTs), they are formed by GP practices and are responsible for commissioning the majority of local health care services.

### **Chair**

The highest office of an organised group such as a board or committee. The person holding the office is typically elected or appointed by the members of the group. The chair presides over meetings of the assembled group and conducts its business in an orderly fashion.

### **Code of Governance**

*The NHS Foundation Trust Code of Governance* is a document published by Monitor which gives best practice advice on governance. NHS foundation trusts are required to explain, in their annual reports, any non-compliance with the code. An updated version will be available from our website in late 2013.

### **Commissioners**

Commissioners specify in detail the delivery and performance requirements of providers such as NHS foundation trusts, and the responsibilities of each party, through legally binding contracts. NHS foundation trusts are required to meet their obligations to commissioners under their contracts. Any disputes about contract performance should be resolved in discussion between commissioners and NHS foundation trusts, or through their dispute resolution procedures.

**Committee**

A small group intended to remain subordinate to the board it reports to.

**Compliance Framework**

Monitor's *Compliance Framework* serves as guidance as to how Monitor will assess governance and financial risk at NHS foundation trusts, as reflected by compliance with the Continuity of Services and governance conditions in the provider licence. NHS foundation trusts are required by their licence to have regard to this guidance. It will be superseded by the *Risk Assessment Framework* during 2013/14.

**Constituency**

Membership of each NHS foundation trust is divided into constituencies that are defined in each trust's constitution. An NHS foundation trust must have a public constituency and a staff constituency, and may also have a patient, carer and/or service users' constituency. Within the public constituency, an NHS foundation trust may have a "rest of England" constituency. Members of the various constituencies vote to elect governors and can also stand for election themselves.

**Constitution**

A set of rules that define the operating principles for each NHS foundation trust. It defines the structure, principles, powers and duties of the trust.

**Department of Health (DH)**

The government department that supports the government to improve the health and well-being of the population.

**Executive directors**

Board-level senior management employees of the NHS foundation trust who are accountable for carrying out the work of the organisation.

**Governors**

Elected or appointed individuals who represent foundation trust members or stakeholders through a council of governors.

**Health and Wellbeing Boards (HWBs)**

Each local authority has its own HWB. This is a forum in which health and social care service representatives can collaborate to understand local needs and agree priorities for addressing the broader determinants of health and wellbeing and reduce health inequalities among the local population. Boards took on their statutory functions from April 2013. NHS foundation trusts do not have an automatic right to sit on HWBs, which may themselves decide if they wish to appoint additional persons.

**Health Overview and Scrutiny Committee**

The Health Overview and Scrutiny Committee of a local authority inquires into any matter relating to the planning, provision and operation of health services in the area. NHS foundation trusts must consult with the relevant Overview and Scrutiny Committees before making any substantial variations to their service offerings that will change mandatory services, and must provide the Health Overview and Scrutiny Committees with any information they request. A number of Health Overview and Scrutiny Committees, some

from outside a trust's locality, may take an interest in the provision of an NHS foundation trust's services if it offers a regional or national tertiary referral service.

### **Healthwatch England**

Established in October 2012, Healthwatch England can advise the Secretary of State for Health, NHS England, local authorities, Monitor and the CQC about concerns raised by local Healthwatch bodies for possible investigation.

### **Human resources (HR)**

A term that refers to managing "human capital", the people of an organisation.

### **Integrated care**

To help organisations work across traditional boundaries to better deliver care and support that meets the needs of patients and service users, integrated care is primarily about individuals' experience of care and ensuring better outcomes through coordinated, person-centred care and support. It is neither necessarily about structures, organisations and pathways, nor about the way that care is funded or commissioned. You can find out more information on Monitor's website [here](#).

### **Lead governor**

Governors will generally communicate with Monitor through the trust's chair. However, there may be instances where it would not be appropriate for the chair to contact Monitor, or for Monitor to contact the chair (for example, in relation to the appointment of the chair). In such situations, we advise that the lead governor should communicate with Monitor. The role of lead governor is set out in *The NHS Foundation Trust Code of Governance*.

### **Licence**

The NHS provider licence contains obligations for providers of NHS services that will allow Monitor to fulfil its [new duties](#) in relation to: setting prices for NHS-funded care in partnership with NHS England; enabling integrated care; preventing anti-competitive behaviour which is against the interests of patients; supporting commissioners in maintaining service continuity; and enabling Monitor to continue to oversee the way that NHS foundation trusts are governed. It replaces the Terms of Authorisation.

### **Local Involvement Networks (LINKs) and local Healthwatch**

Local Healthwatch was established in April 2013 under the terms of the 2012 Act. Local Healthwatch continues the functions of Local Involvement Networks (LINKs) and has additional powers. It builds on the good practice of LINKs establishing relationships with local authorities, CCGs, patient representative groups, the local voluntary and community sector and service providers to ensure it is inclusive and truly representative of the community it serves.

Local Healthwatch bodies: have the power to enter and view services; influence how services are set up and commissioned by having a seat on the local health and wellbeing board; produce reports which influence the way services are designed and delivered; provide information, advice and support about local services; and pass information and recommendations to Healthwatch England and the CQC.

**Members**

As part of the application process to become an NHS foundation trust, NHS trusts are required to set out detailed proposals for the minimum size and composition of their membership. Anyone who lives in the area, works for the trust, or has been a patient or service user there, can become a member of an NHS foundation trust, subject to the provisions of the trust's constitution.

Members can: receive information about the NHS foundation trust and be consulted on plans for future development of the trust and its services; elect representatives to serve on the council of governors; and stand for election to the council of governors.

**Monitor**

Monitor is the sector regulator of health care services in England.

**Monitor relationship manager**

Once licensed, each NHS foundation trust is assigned a Monitor relationship manager (details can be found in our [foundation trust directory](#)). The relationship manager ensures that where an NHS foundation trust is found to be in breach of its licence, the trust's board takes the appropriate remedial action.

**National Institute for Health and Care Excellence (NICE)**

NICE provides national guidance and advice to improve health and social care.

**NHS England**

The NHS Commissioning Board, referred to as NHS England, was established as a statutory body from October 2012. From April 2013, it has taken on many of the functions of the former PCTs with regard to the commissioning of primary care health services, as well as some nationally based functions previously undertaken by the Department of Health.

**NHS foundation trusts**

NHS foundation trusts are public benefit corporations authorised under the 2006 Act to provide goods and services for the purposes of the health service in England. They are part of the NHS and provide over half of all NHS hospital, mental health and ambulance services. NHS foundation trusts were created to devolve decision making from central government to local organisations and communities. They are different from NHS trusts as they: have greater freedom to decide, with their governors and members, their own strategy and the way services are run; can retain their surpluses and borrow to invest in new and improved services for patients and service users; and are accountable to, among others, their local communities through their members and governors.

**NHS trusts**

NHS trusts provide health and/or social care services within the NHS. They are legally obliged to financially break-even.

**NHS Trust Development Authority (NHS TDA)**

The NHS TDA brings together a number of functions previously carried out by the Department of Health, Strategic Health Authority clusters and the Appointments Commission. In particular, these include: performance management of NHS trusts; management of the NHS foundation trust pipeline; assurance of clinical quality, governance



and risk in NHS trusts; and appointments to NHS trusts, for example, of chairs and non-executive members and trustees for NHS Charities where the Secretary of State has a power to appoint.

#### **Non-executive director**

Generally independent appointees, who work with the executive directors overseeing the business of the NHS foundation trust.

#### **Operational management**

Operational management concerns the day-to-day organisation and coordination of services and resources; liaison with clinical and non-clinical staff; dealing with the public and managing complaints; anticipating and resolving service delivery issues; and planning and implementing change.

#### **Primary care**

Primary care covers the health services provided by GPs, community dentists, opticians, pharmacists, community nurses and allied health care professionals.

#### **Risk Assessment Framework**

Monitor intends that the *Risk Assessment Framework* will replace the *Compliance Framework* during 2013/14 in the areas of our financial oversight of providers of key NHS services – not just NHS foundation trusts – and the governance of NHS foundation trusts. Monitor has consulted on the draft *Risk Assessment Framework*; the consultation closed in April 2013.

#### **Secondary care**

NHS trusts and NHS foundation trusts are the organisations responsible for running hospitals and providing secondary care. Patients must first be referred into secondary care by a primary care provider, such as a GP.

#### **Senior independent director (SID)**

One of the non-executive directors should be appointed as the SID by the board of directors, in consultation with the council of governors. The SID should act as the point of contact with the board of directors if governors have concerns which approaches through normal channels have failed to resolve or for which such normal approaches are inappropriate. The SID may also act as the point of contact with the board of directors for governors when they discuss, for example, the chair's performance appraisal and his or her remuneration and other allowances. More detail can be found in the *Code of Governance*.

#### **Service user/s**

People who need health and social care for mental health problems. They may live in their own home, stay in care, or be cared for in hospital.

#### **Strategic management**

Strategic management involves setting objectives for the organisation and managing people, resource and budgets towards reaching these goals.

#### **Statutory requirement**

A requirement prescribed by legislation.

**Terms of authorisation**

Previously, when an NHS foundation trust was authorised, Monitor set out a number of terms with which the trust had to comply. The terms of authorisation have now been replaced by the NHS provider licence, and NHS foundation trusts must comply with the conditions of the licence.

**Vote of no confidence**

A motion put before the board which, if passed, weakens the position of the individual concerned.

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