1. Introduction

The Health and Social Care Act 2012 set out the Government’s expectation for all trusts to gain Foundation Trust (FT) status with the aim to ensure that, at some point in the future, no trusts will operate under the current NHS trust model.

The Act also set out new rules for existing Foundation Trusts relating to governance and financial arrangements to increase the financial autonomy and local accountability for FTs.

2. NHS Trusts

The Government has made clear its expectation that all NHS trusts should achieve Foundation Trust status. This emerged from the recent NHS reforms with an expectation that this should be achieved by April 2014. The deadline was originally indicated in the legislation introduced in the Health and Social Care Act, but was since relaxed to allow more time for trusts to apply for FT status. However, the Act allows the Secretary of State to abolish all remaining NHS Trusts at a future date if s/he chooses.

2.1 NHS Trust Development Authority

A new temporary organisation, the NHS Trust Development Authority (NTDA), took on responsibility for the ‘FT pipeline’ on 1 October 2012 from the outgoing Strategic Health Authorities (SHAs). The NTDA has a fixed term of four years to achieve this work. After which time it is expected that all trusts will have achieved FT status. Therefore, this informally sets the deadline to achieve FT status by April 2016.

The NTDA’s functions include:

- Performance management of NHS trusts
- Management of the FT pipeline
- Providing assurance of clinical quality, governance and risk in NHS trusts

More information about the new NTDA

2.2 Tripartite Formal Agreements

Each NHS trust signed a Tripartite Formal Agreement (TFA) before the end of September 2011. This is a formal business plan in which trusts put forward a date by which they believe they can achieve FT status and milestones are built in to the plan. The TFA summarises the main challenges facing each organisation and the actions that need to be taken. All TFAs were agreed with SHAs and the Department of Health. Previously, SHA clusters were monitoring trusts’ progress against the deadlines set out in their individual TFA. From April 2013, the NTDA now holds trusts to account according to progress against the milestones.

View the Tripartite Formal Agreement for your trust.
2.3 The FT application process
Alongside its various new duties, Monitor will continue to oversee Foundation Trusts in the new system. The FT application process is summarised below:

- **Phase 1.** Each trust develops a plan with the NTDA, this includes a 12 week public consultation exercise.
- **Phase 2.** Secretary of State support phase. The Department of Health assesses the business case and decides whether it is ready to go to Monitor. The Secretary of State for Health makes the final decision.
- **Phase 3.** Monitor assesses the case and can grant FT status if appropriate. This is performed by an assessment team that will visit the trust and hold interviews, working together with the Care Quality Commission (CQC). This process takes three to four months.

Monitor looks at three key areas in considering applications:

1. **Is the trust well governed** with the leadership in place to drive future strategy and improve patient care?
2. **Is the trust financially viable** with a sound business plan?
3. **Is the trust legally constituted**, with a membership that is representative of its local community?

For more information about the criteria for each area see **Monitor’s guide for applicants**.

2.4 Challenges for NHS trusts
The main barriers to meeting FT status are meeting the financial requirements. A report by the National Audit Office examining the FT pipeline in October 2011 found that 80 per cent of trusts faced financial challenges. The most common issues identified were:

- High levels of historic debt
- Ongoing large Private Finance Initiative (PFI) costs
- Misalignment between hospital capacity and demand for services from commissioners
- Imbalance between primary and secondary care

The extent of the problem remains unclear. Of the 99 trusts without FT status, at least 20 trusts have identified that they will not be viable and Department of Health analysis suggests that 48 trusts will struggle financially. Some trusts face significant PFI costs and in February 2012 the Department of Health announced that £1.5 billion support over 25 years would be provided to some of the 22 NHS trusts with significant PFI debts. These are:

1. Barking, Havering & Redbridge
2. Epsom & St Helier
3. Imperial College Healthcare
4. North West London Hospitals
5. West Middlesex University Hospital
2.5 Alternative options for NHS trusts

NHS Trusts that have significant financial concerns and are therefore unlikely to achieve FT status on time are expected to find an alternative solution.

2.5.1 Mergers & Acquisitions

One option for a NHS trust in relation to achieving FT status is to merge with an existing FT. A number of mergers have already taken place and others are in the pipeline. Mergers have to be referred to the Co-operation and Competition Panel (now part of Monitor) which has concurrent responsibility with the Office of Fair Trading to advise whether the proposed merger is consistent with the Principles and Rules for Cooperation and Competition.

In some cases a merger is proposed with a neighbouring FT. For example, Suffolk Mental Health Partnership NHS Trust merged with Norfolk & Waveney Mental Health FT. In other cases there is a process for choosing a FT partner with bids invited from interested FTs. For example, South Essex Partnership FT was chosen for the acquisition of Bedfordshire & Luton Partnership NHS Trust.

There are also examples of NHS trusts merging prior to the formulation of an application for FT status, for example the merger of Barts & The London, Newham, and Whipps Cross to form Barts Health NHS Trust.

Note: the term ‘merger’ is used to describe many of these transactions but some are in fact acquisitions. A merger occurs when two trusts are both dissolved to create a new trust. An acquisition occurs when one trust remains in existence and takes over another trust, the acquired trust being dissolved as part of the transaction.

2.5.2 Management Franchise

Instead of pursuing a merger, the Health and Social Care Act 2012 makes it possible for NHS trusts to continue to operate under the management of another Foundation Trust or private enterprise. For example, Hinchingbrooke Health Care NHS Trust undertook a procurement process for a management franchise to run the hospital. This was open to NHS and private sector organisations. The outcome was that an independent company, the Circle Partnership, was awarded a ten year contract to take operational control of the trust from 1 February 2012. Staff employed by the organisation remain as NHS employees.

3. Foundation Trusts

The changes to the NHS introduced by the Health and Social Care Act 2012 legislate for several changes for NHS trusts and Foundation Trusts.

3.1 The Private Patient Income cap for Foundation Trusts has been increased to 49 per cent of trust income

The Private Patient Income cap is now set at 49 per cent, whereas previously, the cap varied from FT to FT, but was considerably lower. However, an increase in the proportion of an FT’s private income of more than 5 per cent at a time would need majority approval by its governors and every FT must set out how its non-NHS
income has benefited NHS services in its annual report. To support monitoring of the cap, FTs are required to produce separate accounts for their NHS and privately-funded activities.

3.2  Transparency and governance
The Health and Social Care Act states that meetings of the board of directors of Foundation Trusts must be open to members of the public. However, members of the public may be excluded from a meeting for certain special reasons.

3.2.1  The role of Governors
The Health and Social Care Act 2012 introduced new responsibilities for Foundation Trust governors. At least half of the governors must agree to approve the following activities.

- any ‘significant transactions’ as described by the trust’s constitution
- an application by the trust to enter into a merger, acquisition, separation or dissolution
- any proposed increases in private patient income of five per cent or more in any financial year. Governors will also be asked to decide whether the trust’s private patient work would significantly interfere with the trust’s principal purpose i.e. the provision of services for the NHS
- amendments to the trust’s constitution

4.  BMA key concerns

- There is a risk of repeating the mistakes of Mid-Staffordshire FT if trusts are under greater pressure to gain FT status with an emphasis on financial performance, which may be prioritised over patient safety.
- The potential impact of increasing the PPI cap to 49 per cent remains unclear, especially for FTs that have had very low caps in place. This may result in prioritisation of private patients over NHS services.

5.  Further information

A new failure regime has been introduced for Foundation Trusts. For more information see the briefing note, ‘Understanding the reforms… the failure regime’.

Monitor will oversee Foundation Trusts via joint licensing arrangements with the Care Quality Commission. For more information see the briefing note, ‘Understanding the reforms… Monitor and regulation’.

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