

# Addendum to the transactions guidance – for trusts forming or changing a subsidiary

November 2018

We support providers to give patients safe, high quality, compassionate care within local health systems that are financially sustainable.

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# 1. Introduction

This addendum to NHS Improvement's *Transactions guidance – for trusts undertaking transactions, including mergers and acquisitions* outlines a new framework that changes the way subsidiaries are reported to and approved by NHS Improvement from 26 November 2018. This framework strikes a balance between assuring us and respecting NHS freedoms and the ability of the NHS to innovate. With the NHS facing a period of significant change, trusts are increasingly looking at innovative ways of managing their financial and operational delivery and many are considering subsidiaries to do this.

This framework clarifies the required approval process before trusts can implement plans for subsidiaries; it does not affect their legal ability to develop such plans.

This addendum applies only to subsidiary transactions (as defined in Section 1.1 below). Our transactions guidance remains the prevailing framework for the reporting and review of all other provider transactions.

## 1.1. Who should use this addendum?

This addendum should be used by all NHS trusts and foundation trusts considering transactions involving the creation of subsidiaries or material changes to existing subsidiaries (referred to in this addendum as 'subsidiary transactions').

For clarity, business cases that in NHS Improvement's opinion materially change an existing subsidiary are also subject to the revised process outlined in this addendum. Such proposals are considered as if the trust were making a new investment.

Determining whether something is a 'material change' involves an element of judgement and we do this on a case-by-case basis. Examples of changes that may be material include asset sales or transfers, and changes to the subsidiary's risk profile including those to the terms and conditions of employment of staff, the ownership share of the subsidiary, or the scale or scope of the activities of the subsidiary. Trusts considering making changes to existing subsidiaries are encouraged to engage with their NHS Improvement regional relationship lead as soon as possible so that we can determine whether these are 'material'.

The term **'subsidiary'** means a **separate, distinct legal entity** for the purposes of taxation, regulation and liability **owned or partly owned** by a provider. 'Subsidiary' includes companies limited by shares or companies limited by guarantee, limited liability partnerships and community interest companies.

For clarity, 'subsidiary' includes joint ventures falling within the definition above.

Throughout this document the term 'trust' refers to both NHS trusts and foundation trusts unless specified otherwise.

## 1.2. What has changed?

### Reporting thresholds

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The reporting thresholds set out in the transactions guidance (Section 2.2) are superseded for subsidiary transactions as defined in Section 1.1 above. All subsidiary transactions (regardless of size, legal structure or purpose) are now 'reportable' to NHS Improvement. All subsidiary transactions therefore require a trust-approved business case detailing the nature of the proposals and the plan's inherent risks to be submitted.

### Review process

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Each business case will be reviewed first by an NHS Improvement panel to determine whether a transaction is deemed material or significant. This determines if further review is required, the level of which will be based on the proposal's inherent risks.

### Additional review requirements for NHS trusts

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For NHS trust proposals, the business case must demonstrate to the Secretary of State that the subsidiary is income generating. We co-ordinate our review process with that for obtaining Secretary of State consent on a case-by-case basis, considering the inherent risks of each proposal. This includes determining whether we should complete our review before obtaining the required Secretary of State of consent.

## Revised board certification

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Appendix 1 sets out a revised board certification that references subsidiary-specific risks. For subsidiary transactions, this replaces the board certification set out in the transactions guidance (Appendix 8). All trusts undertaking subsidiary transactions are required to complete the revised board certification and submit this to NHS Improvement as described in [Section 4.3](#) as part of the transaction review process.

### 1.3. Implementing the updated approach

The framework set out in this addendum becomes effective on **26 November 2018**. We recognise that this updated approach increases the regulatory burden on some providers and we commit to reviewing the approach after one year to consider whether it is still appropriate and proportionate.

We will in due course align the subsidiary review process with the transactions guidance. Once we have a better understanding of the inherent risks of subsidiary proposals we will:

- set a 'bar' for a subsidiary transaction to be reportable (rather than all subsidiaries being reportable)
- set clearer parameters to determine the level of review required
- clarify expectations for a subsidiary transaction to be rated green or amber.

As part of this, we will provide further guidelines on the meaning of the term 'material' in the context of proposals to make a 'material' change to an existing subsidiary.

This addendum does not apply to existing subsidiaries; however, trust boards should assure themselves that their existing subsidiaries meet the requirements set out in this addendum (including the appendices). This addendum does apply to proposals to make a material change to an existing subsidiary.

Where all or part of the proposal for a subsidiary transaction is the subject of a national programme, trusts should continue to engage with national leads to discuss and develop their plans.

# 2. Existing legal and regulatory arrangements

## 2.1. Legal powers – disparity between NHS foundation trusts and NHS trusts

**NHS foundation trusts** have power under Section 46 of the NHS Act 2006 to form subsidiary companies for the purposes of, or in connection with, the exercise of their functions – that is, for purposes of core NHS healthcare provision. They may also form subsidiary companies for income-generation purposes. Currently 65 subsidiary companies are of sufficient size and/or controlling influence to be reflected in foundation trust accounts.

**NHS trusts** have a more limited power under paragraph 20(1) and (2) of Schedule 4 of the NHS Act 2006 to form or participate in ownership of a subsidiary company for income-generation purposes only – that is, making additional income available by performing non-NHS services. An NHS trust planning to set up a subsidiary for the purposes of income generation can only do so:

- “(a) to the extent that it does not, to any significant extent, interfere with the performance of its functions or its obligations under NHS contracts; and
- (b) in circumstances specified in directions under section 8 of the 2006 Act, with the consent of the Secretary of State.”

Guidance set out in *National Health Service: Income generation – best practice* (Department of Health, February 2006) provides that “for a scheme to be classified as an income generation scheme, the following conditions need to be met:

- the scheme must be profitable and provide a level of income that exceeds total costs...
- the profit made from the scheme, which the NHS body would keep, must be used for improving the health services
- the goods or services must be marketed outside the NHS. Those being provided for statutory or public policy reasons are not income generation.”

Proposals for income-generating NHS trust subsidiaries must have Secretary of State consent pursuant to directions to NHS trusts dated September 2002 (see [Section 2.3](#) for links to the relevant directions).

The agreed national view is that the general legal power of NHS trusts to do anything that appears necessary or expedient in connection with their functions does **not** allow them to form or participate in companies for the purposes of core NHS healthcare provision. Trusts should not seek legal advice at the public expense on this issue.

The process for assuring that an NHS trust subsidiary proposal is income generating is discussed in [Section 3.2](#).

Further regulatory considerations and guidance are given in Section 2.3.

## 2.2. VAT position

All providers, be they NHS or private sector, must operate within the existing VAT legislation that applies to their particular entity.

The Department of Health and Social Care (DHSC) wrote to the finance directors of all NHS providers in September 2017 to remind them of their responsibilities around tax and advising that tax avoidance arrangements should not be entered into under any circumstances. We expect all NHS providers to follow this guidance when considering any new arrangements or different ways of working.

The letter also stated that trusts should not spend money on private sector consultancy support in the development of tax avoidance arrangements as this represents active leakage from the healthcare system. This message is consistent with advice provided in HM Treasury's *Managing public monies* guidance (Section 5.6; July 2013).

## 2.3. Further regulatory considerations and guidance for NHS foundation trusts and NHS trusts

Foundation trust subsidiaries providing healthcare services may be required to hold an NHS-controlled provider licence. For more information, see [Licensing application guidance for NHS-controlled providers](#).

We have published guidance on various types of organisational forms in the context of new care models:

- [Oversight of new care models: your questions answered](#)
- [Illustrative scenario modelling of providers organisational forms.](#)

NHS trusts considering an income-generating subsidiary should consider the following guidance:

- [National Health Service: Income generation – best practice](#) (Department of Health, February 2006)
- [The use of companies in income generation by the NHS](#) (Department of Health, 1 April 2005)
- Directions relating to the exercise of powers under section 7(2) and (7A) of the Health and Medicines Act 1988 (Department of Health, 9 September 2002). The directions can be found at Appendix 5 of [The NHS as an innovative organisation. A framework and guidance on the management of intellectual property in the NHS.](#)

We have also published guidance on due diligence, set-up, operational and governance arrangements for trusts considering alternative commercial models for their services:

- [pathology network due diligence guide](#)
- [pathology networks operational governance guide](#)
- [corporate services productivity commercial options guidance.](#)

We plan to publish summary guidance on the alternative commercial options available and what needs to be considered for each.

# 3. Updated reporting and review process

## 3.1. Subsidiary transaction reporting thresholds

All NHS trust and foundation trust proposals for subsidiary transactions are reportable to NHS Improvement and require a trust board-approved business case to be submitted to the NHS Improvement regional relationship lead for the trust, copied by email to [nhsi.subsidiaries@nhs.net](mailto:nhsi.subsidiaries@nhs.net). Further information on the business case and the submission process is set out in [Section 4.1](#).

The review process also applies to any ‘material’ changes to an existing subsidiary to ensure that all risks are fully considered – that is, such proposals are considered as if the trust were making a new investment.

As set out in the transactions guidance (Section 3), trusts are encouraged to engage with their NHS Improvement regional team as early as possible to discuss potential subsidiary transactions. This gives our regional teams the opportunity to advise trusts on their specific proposals and draw on specialist support from central teams as appropriate.

## 3.2. Subsidiary transaction review process

The degree to which we scrutinise any proposed subsidiary transaction depends on our initial view of its inherent risk. This review determines whether a subsidiary transaction is classified as ‘material’ or ‘significant’. This classification in turn determines the level of detailed review we consider necessary.

As a minimum, any subsidiary transaction is considered at least ‘material’. All subsidiary transactions require the submission of a business case supported initially by underlying financial projections, followed by completion and submission of a trust board certification.

## **Desktop review by NHS Improvement panel – transaction classification**

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An NHS Improvement panel reviews each business case and underlying financial projections to consider the level of inherent risks associated with the proposal. The panel includes appropriate governance, finance and subject matter experts across areas relevant to the proposal being considered (eg pharmacy, pathology and estates) as well as members of NHS Improvement’s transactions review team.

Where appropriate, we will draw from experts with suitable qualifications and experience but no interest in the proposal under consideration: for example, the expert could be from a different part of the country from that covered by the proposal. We will ensure that the experts are under a duty of confidence. Trusts will have the right to refuse a particular expert on reasonable grounds.

The review considers the specific aims of the business case alongside the overarching governance, financial, quality and operational impacts of the proposals on the trust, the wider health system and its patients. It has regard to the questions in Appendix 2.

The panel determines the transaction classification based on the nature and level of risks identified in its review.

For proposals involving changes to existing subsidiaries, the panel considers the extent to which these will alter the risk profile of the subsidiary, and in turn result in significant risks for the parent trust. As part of this, the panel considers the extent to which risks are considered and mitigated through existing trust and subsidiary governance processes.

Lower risk transactions are classified as ‘material’ and higher risk transactions as ‘significant’.

We inform the trust of the key risks identified and risk classification at the end of the panel review.

The panel review takes about three weeks – this is the time from receiving an acceptable business case and underlying financial projections to informing the trust of the risk classification. This timeframe assumes that the business case and financial projections are of high quality and comprehensive.

This transaction classification determines the review and submission requirements.

## **Material subsidiary transactions**

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Where the panel classifies a subsidiary transaction as material, we request evidence in the form of a certification that the parent trust board has satisfied itself in relation to key areas of risk. Appendix 1 to this addendum gives the format for the certification.

We may require trusts to provide additional evidence to support their certification as determined on a case-by-case basis, taking account of the key risks identified. To reduce the regulatory burden, we look at existing trust documentation wherever possible and make every attempt to minimise requests for bespoke documentation.

The certification in the required format should be submitted to and agreed with us before the trust enters into any legally-binding arrangements in relation to the subsidiary transaction.

## **Significant subsidiary transactions**

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Where the panel classifies a transaction as significant, we undertake a further detailed review in addition to requiring the board certification as outlined above for material transactions. In this detailed review we look at up to four domains, depending on the nature and risks of the proposed subsidiary transaction:

- strategy
- transaction execution
- quality
- finance.

Appendix 2 to this addendum sets out an indicative full scope for the review of a subsidiary transaction classified as significant, but each review is tailored to reflect the risks inherent in the proposal.

This detailed review takes four to six weeks on average, but this will depend on the risks inherent in the proposal.

## **Interviewing key stakeholders**

Our detailed review includes a series of planned meetings with the trust and key stakeholders to understand the proposals in more detail and how the board has been assured of the risks involved.

## **Financial projections**

As part of the detailed review of the business case, we look at the long-term financial projections prepared by the trust which underpin the financial element of the business plan. This review focuses on understanding and evaluating:

- the reasonableness of the key assumptions underlying the forecasts
- the key risks to achieving the forecast financial position
- whether key risks are effectively mitigated by clearly articulated plans and there is demonstrable capability to deliver these plans.

## **Meeting the parent trust's executives**

Once we have largely completed our detailed review, we meet (either face to face or by teleconference) appropriate executives at the parent trust to discuss the areas identified during the review as requiring challenge. We advise the trust of the key areas for discussion beforehand to give it the opportunity to prepare its response to our concerns.

## **Transaction risk rating**

After taking into account the trust's response to any issues raised at the meeting, our review team recommends a risk rating for the transaction. This rating is finalised by the appropriate NHS Improvement committee at a decision meeting.

A risk rating of 'green' or 'amber' allows the trust to proceed with its proposals, although this may be subject to additional oversight and monitoring of transaction-specific risks post transaction. A rating of 'amber' means we are likely to want to ensure that key implementation risks are addressed properly: for example, with additional oversight and monitoring to ensure that any staff consultations are completed properly.

The trust should not enter into any legally-binding arrangements in relation to the subsidiary transaction until a 'green' or 'amber' risk rating is formally communicated by NHS Improvement.

We would expect that any formal consultation requirements with staff would start after the trust receives a transaction risk rating of 'green' or 'amber'.

If we consider the business case too high risk to progress, our review team recommends that the transaction is risk rated 'red', meaning that we consider the issues arising from the review to be serious enough to delay the transaction. The trust then needs to restructure the proposal to address these risks. If this does not happen, we can use our regulatory powers to stop the transaction if required.

### **Additional review process for NHS trust subsidiary transaction proposals**

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Subsidiary transaction proposals by NHS trusts currently require the consent of the Secretary of State, where the business case for a proposal needs to demonstrate that the subsidiary is income generating.

We are discussing a revised process with DHSC for these transactions and once agreed, we will provide further information on the process in early 2019, including the detailed steps and timescales involved and any specific tests and thresholds used to determine whether a subsidiary transaction proposal is for income generation purposes as defined.

Trusts should apply for Secretary of State consent through NHS Improvement by submitting the supporting documentation to their NHS Improvement regional relationship lead, copied by email to [nhsi.subsidiaries@nhs.net](mailto:nhsi.subsidiaries@nhs.net). NHS trusts are encouraged to seek this consent as early as possible.

NHS trusts may not enter into any legally-binding arrangements in relation to the subsidiary transaction until Secretary of State consent has been obtained. This is additional to the requirements outlined above that NHS Improvement has completed its review process and agreed the trust board certification and, for significant transactions only, formally communicated a 'green' or 'amber' transaction risk rating to the trust.

# 4. Submissions

All subsidiary transaction proposals require a business case, financial projections and a board certification in the required format to be submitted to NHS Improvement. This should be the same as the information required by the trust board so will not impose any extra burden on the sector. Additional submissions are determined on a case-by-case basis as set out below.

## 4.1. Business case

For all subsidiary transaction proposals, trusts should submit a business case to their NHS Improvement regional trust relationship lead, copied by email to [nhsi.subsidiaries@nhs.net](mailto:nhsi.subsidiaries@nhs.net). This should be reviewed and approved by the trust board before submission.

The business case should be tailored to the specific proposal and used by the trust board to assure itself that it has considered and mitigated all financial, operational and clinical risks associated with the subsidiary transaction proposal as appropriate. It should be clear from the business case that the benefits of the proposal outweigh the risks, that the proposal is deliverable in all aspects and that the commercial rationale is not dependent on the subsidiary enabling a different VAT treatment from that of the current trust arrangements.

It should also be evident that comprehensive and effective due diligence has been undertaken to provide a clear and accurate baseline for operational performance, governance, risk and financial position (see [Section 2.3](#) for guidance on due diligence).

The level of detail in the business case should be linked to the complexity and level of risk associated with the proposal. At a minimum, the information should be sufficient to answer the questions in Appendix 2.

## 4.2. Financial projections

The financial element of the business case should be underpinned by long-term financial projections and trusts should submit these to their NHS Improvement regional relationship lead, copied by email to [nhsi.subsidiaries@nhs.net](mailto:nhsi.subsidiaries@nhs.net) together

with the business case. Trusts are not required to use the NHS Improvement long-term financial model for these purposes but may do so if they choose.

The financial projections should cover an appropriate period to enable the financial risks and benefits of the proposal to be understood, and to clarify the recurrent financial position of the subsidiary.

The projections should be in sufficient detail to give reviewers an understanding of the key assumptions driving them and presented in a format which enables comparison of the counterfactual position with the financial impact of the subsidiary transaction.

### 4.3 Board certification

For all subsidiary transaction proposals, trusts should submit a certification in the format set out in Appendix 1 to their NHS Improvement regional relationship lead, copied by email to [nhsi.subsidiaries@nhs.net](mailto:nhsi.subsidiaries@nhs.net). The certification should be addressed to NHS Improvement and signed for and on behalf of the board of directors of the trust. It should be accompanied by the paper to the trust board including detail on the commercial rationale and strategy for the subsidiary transaction. For certain transactions we may require trusts to provide additional evidence to support their certification.

### 4.4. Additional submissions

We determine additional submission requirements on a case-by-case basis, based on the nature and risks of the proposal. We make every effort to minimise regulatory burden and wherever possible rely on existing trust information and reports rather than requiring bespoke information submissions.

# Appendix 1: Board certification

All trusts undertaking transactions which involve the creation of subsidiaries or material changes to existing subsidiaries (hereinafter referred to as 'subsidiary transactions') should complete this certification as part of the transaction review process and, in the case of an NHS trust, the certification will form the basis of the approval process for the subsidiary transaction.

The certification should be addressed to NHS Improvement and signed for and on behalf of the board of directors of the trust. The certification should be accompanied by the paper to the trust board including detail on the commercial rationale and strategy for the subsidiary.

NHS Improvement needs to complete its review of the subsidiary transaction as set out in the addendum before the subsidiary transaction can proceed.

In this appendix, the term 'subsidiary' means a separate, distinct legal entity for the purposes of taxation, regulation and liability, owned or partly owned by a provider. 'Subsidiary' includes companies limited by shares or companies limited by guarantee, limited liability partnerships and community interest companies.

In addition to the certification, NHS Improvement seeks, on a discretionary basis, further evidence for the level of assurance the trust board has obtained in relation to the subsidiary transaction, as set out in the addendum.

The trust board should certify that it is satisfied that it has:

## **In relation to system risks:**

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- Considered a detailed options appraisal before deciding that the proposed subsidiary transaction aligns with wider system plans and is at least financially neutral for the wider system and delivers benefits for patients and the trust, and that the subsidiary is the best vehicle to deliver these benefits.

## In relation to financial risks:

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- A clear commercial strategy for the proposals which is independent of the subsidiary enabling a different VAT treatment from that of the current trust arrangements.
- Conducted an appropriate level of financial, clinical and market due diligence relating to the proposed subsidiary.
- Considered the implications of the proposed subsidiary on the Single Oversight Framework (SOF) segment of both the parent trust and the subsidiary where applicable, focusing on the finance and use of resources metrics and taking full account of reasonable downside sensitivities.
- Taken into account the implications for access to capital and revenue funding from the Department of Health and Social Care (DHSC) as well as tariff-related funding in developing the financial plan for the subsidiary, and agreed key assumptions in the business plan with relevant stakeholders, including DHSC where appropriate.
- Taken into account the independence of the subsidiary in relation to the delivery plans for the parent trust's own efficiency and CIP targets.
- Ensured relevant commercial risks are understood and mitigated, including risks to the trust from the subsidiary's credit arrangements and the relationship between any existing guarantee arrangements and funding arrangements for the subsidiary.
- Ensured that any transactions between the trust and the subsidiary do not pose a risk to existing credit arrangements, such as loan agreements with DHSC.
- Ensured that the risks associated with any transactions between the trust and the subsidiary are understood: for example, the risk associated with any asset transfers, including the impact of any existing guarantee arrangements on such transactions.
- Received appropriate external advice from independent professional advisers with relevant experience and qualifications, including tax advice where the subsidiary enables a different VAT treatment from that of the current trust arrangements.<sup>1</sup>

<sup>1</sup> We expect trusts to obtain appropriate VAT advice where proposals with a clear commercial rationale result in a different VAT treatment from existing trust arrangements. However, trusts should not pay external consultants for VAT advice in relation to tax avoidance schemes – that is, proposals for which no clear commercial rationale stands in the absence of any VAT benefits.

- Resolved any issues relating to the proposed subsidiary and its treatment for accounting purposes and received appropriate professional advice.

### **In relation to operational risks:**

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- Conducted appropriate enquiry about the probity of any partners involved in the proposed subsidiary that considers the nature of the services provided and the likely reputational risk.
- Conducted appropriate enquiry about the organisational and management capacity and capability of any partners involved in the proposed subsidiary that considers the nature and scope of services to be provided by the subsidiary and the potential risks to clinical, finance and operational sustainability.
- Conducted an appropriate assessment of the nature of services to be provided by the subsidiary and any implications for reputational risk arising from these.
- Sought legal advice on the transaction, including those associated with any transfer of staff and TUPE arrangements, with no indicators of risk that transaction cannot legally proceed.
- Engaged staff in decisions that affect them and the services they provide as pledged in the NHS Constitution, and has plans to comply with any consultation requirements, including staff consultations.
- Established the organisational and management capacity and skills to deliver the planned benefits of the proposed subsidiary, including where relevant the delivery of services at scale, including but not limited to assuring itself that the subsidiary will be able to attract and retain staff with the appropriate skills and experience to deliver the service requirements, both immediately and over the life of the business plan.
- Considered the financial, operational and clinical implications of contract termination and developed detailed exit plans to address these, including where appropriate ensuring appropriate legal protection for staff on any early termination of the contract.
- Made provision for the transfer of all relevant assets and liabilities.
- Ensured that the subsidiary will seek any leases or licences required to deliver the services set out in the business case.

## **In relation to quality risks:**

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- Involved senior clinicians at the appropriate level in the decision-making process and they have confirmed they have no material clinical concerns in proceeding with the proposed subsidiary, including consideration of the subsequent configuration of clinical services.

## **In relation to governance risks:**

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- Taken into account the good practice advice in NHS Improvement's transaction guidance or commented by exception where this is not the case.
- Ensured regulatory requirements are understood and complied with, including the potential requirement for the subsidiary to hold an NHS controlled provider's licence.
- For a parent trust that is an NHS trust, complied with paragraph 20(2) of Schedule 4 of the National Health Service Act 2006, and specifically ensured that the subsidiary proposal has Secretary of State consent pursuant to directions to NHS trusts relating to exercise of powers under Section 7(2) and (7A) of the Health and Medicines Act 1988 (September 2002).
- Ensured that there are systems and processes in both the parent trust and the subsidiary which interact to provide the parent trust board with assurance that it has suitable clinical, financial and operational oversight of the subsidiary. Specifically, the systems and processes should ensure that the parent trust board is made aware on a timely basis of overall clinical, financial and operational performance and significant risks in the subsidiary, and can monitor development and implementation of mitigations to address any significant risks. As part of this, the parent trust board is assured that there is sufficient capability and capacity at board level in the subsidiary to provide effective organisational leadership, and that the subsidiary has systems and processes to provide the board of the subsidiary with suitable clinical, financial and operational oversight.
- Ensured that the trust is able to continue to comply with all legal requirements following completion of the subsidiary transaction.

# Appendix 2: Indicative scope for NHS Improvement review of subsidiary transactions classified as significant

Domain	Detailed review of significant transactions – indicative scope
<p><b>Strategy</b></p> <p>Is there a clear strategic rationale for the subsidiary transaction and is the trust board assured that there is the capability, capacity and experience to deliver the strategic objectives of the transaction?</p>	<p>What challenges faced by the trust is the subsidiary transaction seeking to address?</p> <p>Has there been a detailed options appraisal of the alternatives for addressing these challenges and is there a clear rationale for selecting the subsidiary transaction?</p> <p>Does the options appraisal consider the long-term environment and any potential changes (eg cross-provider co-operation through sustainability and transformation partnerships)?</p> <p>Has appropriate market research been undertaken into the risks and opportunities for goods and services to be provided by the subsidiary?</p> <p>Does this rationale set out why it is the best option for patients, the trust and the wider system?</p> <p>Is the subsidiary the most appropriate vehicle to deliver the benefits associated with the transaction?</p> <p>How is the trust board assured that the subsidiary board has the capability, capacity and experience to deliver the strategic objectives of the transaction?</p> <p>Does the business case set out how the proposals will enable a fundamental transformation in trust operations? (For clarity, simply moving assets into a subsidiary does not meet this criterion.)</p>

Domain	Detailed review of significant transactions – indicative scope
<p><b>Transaction execution and implementation</b></p> <p>Are the trust and the subsidiary able to execute and implement the transaction successfully?</p>	<p>Does the trust board have the appropriate capability and capacity to minimise implementation risks? How is the trust board assured that the subsidiary board has the appropriate capability and capacity to minimise implementation risks?</p> <p>What is the trust’s current SOF rating and does this have any implications for its ability to execute and implement the transaction successfully?</p> <p>Have similar arrangements to the subsidiary transaction proposal been implemented elsewhere and if so, have any lessons learned from these arrangements been considered in developing the proposal?</p> <p>Is the trust board able to identify and quantify transaction risks appropriately? Is its approach to due diligence robust and comprehensive? Is there evidence for a clear understanding of the baseline for operational performance, governance, risk and financial position, and that key risks have been recorded?</p> <p>Has the trust board effectively mitigated key risks and established effective processes for the continued oversight and/or management of these risks post transaction?</p> <p>How is the trust board assured that there is a robust and comprehensive plan for implementation of the transaction including detailed plans for the first 100 days post transaction and plans for the realisation of benefits over the longer term?</p> <p>How is the trust board assured that transition risks have been considered and mitigated, including any risks around the impact of new systems and processes and any cultural changes impacting staff transferring from the trust to the subsidiary?</p> <p>How is the trust board assured that the subsidiary will have the organisational capacity and capability to deliver the business plan, taking into account the nature and scope of services to be provided by the subsidiary? As part of this, how is the trust board assured that the subsidiary will have the ability to attract and retain staff with the appropriate skills and experience to deliver the service requirements, both immediately and over the life of the business plan?</p> <p>Does the business case outline a robust and comprehensive workforce strategy for the subsidiary?</p> <p>Has the trust engaged staff in decisions that affect them and the services they provide as set out in the NHS Constitution?</p>

Domain	Detailed review of significant transactions – indicative scope
<p><b>Transaction execution and implementation (continued)</b></p>	<p>Does the business case outline plans to comply with any consultation requirements, including staff consultations?</p> <p>Has the trust board considered the financial, operational and clinical implications of contract termination and developed appropriately detailed exit plans to address these, including ensuring appropriate legal protection in relation to staff and for any early termination of the contract?</p> <p>Will the trust continue to meet all regulatory and legal requirements following implementation of the subsidiary transaction? As part of this, does the trust have a process for managing any confidential patient data which is to be shared with the subsidiary?</p> <p>For NHS trusts, does the business case demonstrate that the subsidiary is income generating as defined?</p> <p>Does the business case outline robust and comprehensive governance systems and processes in both the trust and the subsidiary which work together to provide the trust board with suitable clinical, financial and operational oversight of the subsidiary? Specifically, would these systems and processes ensure that the trust board is made aware on a timely basis of overall performance and significant risks (and their mitigation) in the subsidiary? As part of this, does the business case outline how the relationship with the subsidiary will be managed on a day-to-day basis: for example, a dedicated relationship manager in both the trust and the subsidiary?</p> <p>How is the trust board assured that there are appropriate governance systems and processes in the subsidiary to provide the subsidiary board with suitable clinical, financial and operational oversight of detailed performance as well as risks and their mitigation?</p>
<p><b>Quality</b></p> <p>Is quality maintained or improved as a result of the subsidiary transaction?</p>	<p>Have senior trust clinicians been involved appropriately in the decision-making process for the subsidiary transaction? Have they raised any concerns in relation to the subsidiary transaction and, if so, have these been addressed?</p> <p>If unclear from the answers to the questions on governance systems information in ‘Transaction execution and implementation’ above, is it clear how the trust board will be made aware on a timely basis of quality risks and incidents in the subsidiary, and how these are followed up and mitigated?</p> <p>Does the proposal involve the delivery of any services with the potential to have a material operational impact on the delivery of</p>

Domain	Detailed review of significant transactions – indicative scope
<b>Quality (continued)</b>	clinical services? If so, have clinical risks been considered and appropriate mitigations developed?
<b>Financial</b>  Does the transaction result in a financially viable trust and subsidiary?	<p>Does the business plan demonstrate financial viability for both the trust and the subsidiary over the forecast period?</p> <p>Are there arrangements to ensure that the subsidiary will have access to adequate cash, particularly for the first few months of operation?</p> <p>Have the financial implications of contract termination (including any early termination) been estimated and have any associated financial risks been identified and mitigated?</p> <p>Is there a clear commercial strategy for the transaction that is not dependent on any VAT benefits associated with the transaction?</p> <p>Have key assumptions in the business plan been agreed with stakeholders? Specifically, where the trust receives funding from DHSC, have the assumptions around the impact on future funding been agreed with DHSC?</p> <p>Do the financial projections make reasonable assumptions regarding the impact on CIP requirements in the trust of any transfers of assets, liabilities or staff to the subsidiary?</p> <p>Are the economic risks to the model fully understood, particularly in relation to the availability of public dividend capital (PDC) and funding for workforce pressures?</p> <p>Is the trust board assured that the finance teams in both the trust and the subsidiary have appropriate skills, experience and capacity to manage the execution and implementation of the subsidiary transactions?</p> <p>Are there clear arrangements for any cross charging and invoicing between the trust and the subsidiary? Is it agreed how the subsidiary will be charged for the cost of occupying trust-owned premises (if applicable), including how such charges will be calculated?</p> <p>Are there detailed plans in relation to any asset transfers that identify the assets to be transferred and any that will be leased?</p> <p>Does the business case outline plans for the ongoing management and investment in any assets transferred to the subsidiary?</p>

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