Capital regime, investment and property business case approval guidance for NHS trusts and foundation trusts

Annex 13: Guidance for foundation trusts that are not in financial distress

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1. **Introduction**

1.1 The capital regime (see Section 2 of the main guidance) is applicable to all NHS trusts and to all foundation trusts. The capital delegated limits and business case approval process (see Sections 3 to 4 of the main guidance) applies to any foundation trust in financial distress and to all NHS Trusts.

1.2 The Department of Health (DH) deems a foundation trust to be in financial distress if any of the following apply:

- in financial special measures
- in breach of their licence (financial or non-financial breaches)
- in receipt of distress funding (received or planned).

1.3 With respect to capital investment and property transactions in foundation trusts not in financial distress, the existing guidance (previously issued by Monitor) is still in place and these trusts should continue to refer to *Supporting NHS providers: guidance on transactions for NHS foundation trusts*.¹

1.4 This annex covers capital investment and property transactions only, and summarises the reporting and review thresholds for foundation trusts that are not in financial distress and that do not fall within the definitions noted above.

2. **Thresholds for reporting**

2.1 A capital investment or property transaction should be reported to NHS Improvement if it is significant or material. Such transactions include, but are not limited to:

- projects funded through private finance initiatives
- significant and material capital investments
- joint ventures
- transactions that attract Competition and Markets Authority reviews.

2.2 NHS Improvement considers such investments/transactions (that are not mergers or acquisitions) to be significant according to the thresholds for reporting and detailed review as set in Table 1 below. If a potential investment/transaction meets these reporting criteria, the trust should contact

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NHS Improvement as soon as the transaction becomes a significant likelihood to agree:

- whether the proposed transaction is ‘significant’ and therefore will require a detailed review by NHS Improvement
- the likely timing of any detailed review and
- the scope of any detailed review.

2.3 When notified of investments/transactions that meet the reporting criteria, NHS Improvement will conduct a detailed review to consider the risk involved in undertaking the investment/transaction and communicate this in a letter to the trust board.

2.4 Where a capital or property investment in NHS Improvement’s view represents a substantial level of risk, NHS Improvement will consider whether it needs to use its powers to mitigate that risk.

2.5 Trusts that are considering an investment that may require approval from DH or Her Majesty’s Treasury (HMT) for their planned investment (eg private finance initiative (PFI) investments or other investments that are considered to be novel, contentious or potentially repercussive for the public sector), should engage with NHS Improvement at an early stage.

2.6 Based on NHS Improvement’s assessment of the nature and scale of the risk associated with a reported transaction, it will determine whether a detailed review is required. If it is, the transaction will be classified as significant. Those transactions which trigger the reporting requirements above but do not require a detailed review are classified as material transactions.

2.7 Where a capital or property investment is classified as material, NHS Improvement, as part of its overall assessment of financial and governance risk, will request evidence to support the transaction and certification from the trust board in line with Supporting NHS providers: guidance on transactions for NHS foundation trusts, Appendix 8: Board certification.

2.8 NHS Improvement will decide to classify the transaction as significant and therefore requiring a detailed review according to whether the transaction meets one of the following criteria:

- a relative size of greater than 40% in any of the tests in Table 1 above
- a relative size of between 25% and 40% of the tests set out in Table 1, where required as part of a risk assessment
- a relative size of between 10% and 25% of the tests set out in Table 1 above, when in NHS Improvement’s view one or more major risks or other risk has been identified and is considered relevant.
Table 1: Thresholds for reporting and detailed review

<table>
<thead>
<tr>
<th>Ratio</th>
<th>Description</th>
<th>Reporting requirements</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Non-healthcare/ international</td>
<td>UK healthcare</td>
</tr>
<tr>
<td>Assets</td>
<td>The gross assets subject to the transaction* divided by the gross assets of the foundation trust</td>
<td>&gt;5%</td>
<td>&gt;10%</td>
</tr>
</tbody>
</table>
| Income | The income attributable to the:  
• assets or  
• contract associated with the transaction* divided by the income of the foundation trust | >5% | >10% | None |
| Consideration to total foundation trust capital | The gross capital or consideration associated with the transaction* divided by the total capital of the foundation trust following completion, or the effects on the total capital of the foundation trust resulting from a transaction* | >5% | >10% | Gross capital equals the market value of the target’s shares and debt securities, plus the excess of current liabilities over current assets. Total capital of the capital of the foundation trust equals taxpayers’ equity |

* For the purposes of this capital guidance, transactions cover capital and property investments only.
2.9 Further guidance on the Monitor risk factors is given in the existing guidance *Supporting NHS providers: guidance on transactions for NHS foundation trusts*.

**Joint ventures**

2.10 Foundation trusts entering into major joint ventures, including Academic Health Science Centres (AHSC), that meet any of the triggers below are required to notify NHS Improvement as part of its existing annual certification arrangements:

- **Control**, ie where a separate decision-making body has influence over the development and/or delivery of an foundation trust’s strategy. Where the separate decision-making body is a legal entity, influence will normally be defined as at least 20% ownership.

- **Financial conditions** – where an foundation trust’s:
  - assets within the vehicle are greater than 10% of its assets (as state in the most recent quarterly monitoring submission) or
  - share of income or expenditure from the partnership exceeds 10% of the foundation trust’s total income or expenditure respectively in any full financial year.

- **Legal arrangement**, ie for accredited AHSC only, where a foundation trust enters into a legal agreement establishing the legal arrangement of the partnership.

3. **Framework for other significant capital or property transactions**

**Process for significant (non-PFI) capital investments**

3.1 For major spending proposals there are three key stages in the development of a project business case. These are the strategic outline case (SOC), outline business case (OBC) and full business case (FBC). The primary expectations for key stage documents are summarised in Table 3 in the main guidance.

3.2 For significant capital or property investments, NHS Improvement expects foundation trusts to follow HMT’s *Green book* and related five case model at each key stage in the development of business cases. The model comprises the following five key components:

- strategic case
- economic case
• commercial case
• financial case
• management case.

3.3 NHS Improvement will expect to review the business case throughout the three stages of development as noted in paragraph 3.2 above and Table 3 in the main guidance.

3.4 To assist NHS Trusts and foundation trusts, a joint DH, NHS Digital, NHS England and NHS Improvement business case core checklist is given in Annex 1, including an NHS Improvement bespoke clinical quality checklist for all business cases with a patient-facing or clinical aspect. The checklist is for use by both trust project teams and NHS Improvement in reviewing and providing assurance on capital investment and property transaction business cases. Project teams should treat the checklist as a combination of guidance and advice on material which should be included in a business case.

Process for PFI projects

3.5 PFI projects are typically substantial investments by trusts, involving financial commitments over many years and are likely to be classified as significant transactions under the thresholds set out in Table 1 above.

3.6 NHS Improvement will expect to review a PFI business case at all the stages of the business case development. As a minimum a review will be carried out at the SOC, OBC, appointment business case (ABC) and confirmation business case (CBC) stages, and will expect HMT’s Green book to be followed as part the development and appraisal process. Table 2 summarises the process that trusts typically follow for capital investments funded by PFI.

DH capital investment financing applications

3.7 Where a foundation trust is applying to the Independent Trust Financing Facility for capital financing, foundation trust’s are asked to note that the DH has notified NHS Improvement that alongside the advice given to the DH by the Independent Trust Financing Facility, the DH will also be seeking NHS Improvement’s advice with respect to the impact of approval of the financing on the DH CDEL budget prior to making an approval decision.
<table>
<thead>
<tr>
<th></th>
<th>Strategic outline case (SOC)</th>
<th>Outline business case (OBC)</th>
<th>Appointment business case (ABC)</th>
<th>Confirmation business case (CBC)</th>
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</thead>
<tbody>
<tr>
<td><strong>Trust</strong></td>
<td>• Strategic case for project; fit with strategy and local health economy</td>
<td>• Review and approval of OBC by board</td>
<td>• Revised and updated OBC including output from shortlisted contractors</td>
<td>• Finalisation of case</td>
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<tr>
<td></td>
<td>• Option analysis</td>
<td>• Shortlist of contractors</td>
<td>• Selection of preferred contractor</td>
<td>• Financial close</td>
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<tr>
<td></td>
<td>• Early contact with contractors</td>
<td></td>
<td>• Approve final ABC</td>
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<td><strong>Contractors</strong></td>
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<tr>
<td></td>
<td>• Early contact with trust</td>
<td>• Preparation of bids based on OBC</td>
<td>• Model likely finance costs</td>
<td>• Raise finance</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Set up special purpose vehicle</td>
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<tr>
<td><strong>NHS Improvement</strong></td>
<td>• SOC review</td>
<td>• OBC review focused on risks to affordability</td>
<td>• Review of draft ABC updating OBC review</td>
<td>• CBC review updating ABC review</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Possible board to board meeting</td>
<td>• Possible board-to-board meeting</td>
<td>• Possible board to board meeting</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>• Issue of indicative risk rating</td>
<td>• Issue final risk rating</td>
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<tr>
<td><strong>DH, HMT</strong></td>
<td>• DH and/or HMT and other funding negotiations if applicable</td>
<td>• DH review and approval</td>
<td>• DH review and approval</td>
<td>• DH review and approval</td>
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<tr>
<td></td>
<td></td>
<td>• HMT reviews output of DH review</td>
<td>• HMT reviews output of DH review</td>
<td>• HMT review of output of DH review, ITFF review, other funding approval if applicable</td>
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