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NHS transactions guidance for trusts undertaking transactions, including mergers and acquisitions

Consultation on proposed changes

November 2021

Contents

1. Overview

This consultation document proposes changes to the *NHS transactions guidance for trusts undertaking transactions, including mergers and acquisitions* (the guidance), last updated in 2017. The guidance governs the way NHS England and NHS Improvement[1] assures proposed transactions involving NHS trusts and/or foundation trusts (trusts).

Under our responsibilities to ensure foundation trusts comply with the conditions of their provider licence and the equivalent of these conditions for NHS trusts, we review transactions we consider could significantly alter a trust's risk profile.

We also have a role in granting statutory transactions, such as mergers and acquisitions, if we are satisfied that the transacting trusts have taken the necessary steps to prepare for the transaction.[2]

We have developed the proposals in this consultation from speaking to trusts and system leaders, as well as experts in specialist areas, about how best to update our assurance approach, and with reference to learning from past transactions in the NHS and from other parts of the public and private sectors.

The case for change

Our proposed changes are intended to help ensure that transactions are a success: that they are executed safely and deliver significant benefits. They reflect the increasing role of systems and collaboration between providers in advance of a transaction, as well as the future organisation of services envisioned in The NHS Long Term Plan. When the legislative changes conceived in this plan and subsequently developed come into effect, we will further update the guidance, as needed.

Our understanding of the risks and opportunities for trusts undergoing complex transactions has developed over time. One of our overarching aims has been to ensure our assurance work is focused on those areas that present highest risk and the factors identified as critical to success. We have also sought to shift our focus towards

[1] NHS Improvement exercises the statutory functions of both Monitor and the NHS Trust Development Authority in supporting, reviewing and approving transactions.
[2] This is the case in relation to mergers under sections 56 and 57 of the National Health Service Act 2006 (the Act); acquisitions under sections 56A and 56AA of the Act; separations under sections 56B and 57 of the Act; and dissolutions of foundation trusts under section 57A of the Act.

optimisation - that is, supporting trusts to maximise their chances of a successful transaction as well as identifying the risks of failure.

Intended benefits

- Greater benefits to patients and the wider public, through giving greater emphasis to benefit identification and planning in advance of the transaction.
- A higher chance of a successful transaction from our increased focus on the critical success factors, particularly in relation to culture, staff engagement and digital integration, and setting out what good looks like in these areas.
- A lower regulatory burden for trusts in respect of:
  - our financial assurance work, which will focus more on the incremental costs and benefits of a transaction
  - the overall assurance approach, which we will base on a more nuanced assessment of risk.
- Reduced cost to trusts by removing their need to commission reporting accountant opinions.
- Ensuring that proposed transactions meet the needs of the population beyond providers' boundaries, by considering whether trusts have thought about benefits and disbenefits beyond those to the transacting providers and their patients.

Summary of proposals

Table 1 outlines the proposed changes to the guidance. The reason for each proposed update, the expected benefits and consultation questions are set out in Sections 2 to 6.

Table 1: Summary of proposals

Theme area	Outline of proposals
Definition of a transaction	The guidance will capture: • significant service contracts where we determine that trusts and their systems could be exposed to significant incremental risk, rather than all significant service contracts. • Novel, contentious or repercussive[3] financing arrangements. • the limited number of collaborative arrangements that would give rise to material risk for the parties involved or be difficult to unwind without introducing significant risk. The scope of review in these cases will seek to balance the incentives for trusts to collaborate with the need to gain assurance at the right time. Capital proposals for foundation trusts not in financial distress will be covered by the new capital regime, with delegated limits of £50 million, or £30 million for digital cases.
New transaction tests	All transaction proposals will need to meet a new overall test: Do the deliverable benefits to the population materially outweigh the costs and risks in the medium to long term? Our new approach emphasises a transaction's opportunities to deliver patient and population benefits. We will require evidence of *a* **step change improvement in quality** for patients as a result of the transaction, and **detailed advance planning of patient and population benefits**. We will assess whether the deliverable **financial benefits of the transaction outweigh the costs** over the medium term. We will also need to be assured that transaction proposals form part of an ICS strategy that results in **sustainability at system level**. We will seek to determine whether any risk of material short term financial deterioration is sufficiently mitigated. Where we identify significant risks, we will determine the extent to which these can be mitigated by the trusts and/or system in the longer term. We will expect proposals to demonstrate reasonable **ambition**, and will judge this by seeking to understand how boards have

[3] Novel transactions are those of which the trust has no experience, or are outside the range of normal business activity. Contentious transactions are those which might give rise to criticism of the trust by Parliament, and/or the public, and/or the media. Repercussive transactions are those which are likely to cause pressure on other trusts to take a similar approach and hence have wider implications.

Theme area	Outline of proposals
	assured themselves that the transaction maximises the available opportunities.
Reporting accountant opinions	Trusts will no longer be required to commission opinions from an independent reporting accountant or expert. Instead, we will incorporate the critical elements of this work into our own review.
Focusing our review on what matters	Transactions will be risk assessed using a new framework that includes a wider range of subjective measures. This will help us better focus our review on the proposed transaction's key risks. Our review will concentrate more on areas we consider critical to the success of transactions. These are: • culture • staff engagement • digital integration • readiness for transformational change.
Role of systems	System support for a proposed transaction will be a key consideration in our decision-making. In line with our proposed new overall test, we will consider patient, financial and other benefits and disbenefits beyond the transacting providers.

Responding to the consultation

The consultation closes at **midnight on 21 December**.

Please take the time to respond, using our survey.

Please email nhsi.transactions-consultation@nhs.net if you have any difficulty accessing the survey.

Please let us know if your response (or part of it) is confidential so that we can exclude this from our published summary of responses. We will do our best to meet all requests for confidentiality, but because we are a public body subject to the Freedom of Information Act, we cannot guarantee that we will not be obliged to release your response or part of it, even if you say it is confidential.

2. Definition of a transaction

The current guidance covers statutory transactions and some non-organisational transactions, such as the creation of subsidiaries[4], certain capital investments and major service contracts. This scope will largely remain the same. Where we are proposing changes, this is to ensure that we only review proposed transactions that expose trusts, and the systems they are part of, to significant risk, and to reflect that mergers and acquisitions increasingly follow periods of significant joint working.

Non-organisational transactions

Table 2 shows the three types of non-organisational transaction for which we are proposing changes, and the rationale for these changes.

Table 2: Proposed changes to non-organisational transaction definitions

Transaction type	Rationale
Significant service contracts where we determine that trusts and the systems they are part of could be exposed to significant incremental risk	The current guidance refers to service contracts generally, but we want to exclude straightforward contracting arrangements between trusts and other NHS bodies, which in practice we have not reviewed historically. Instead, we will only consider reviewing proposed service contracts where we determine that trusts and the systems they are part of could be exposed to significant incremental risk. For example: • contracts between trusts and non-NHS organisations that have risk/gain share arrangements. • award of contracts to trusts that would materially change the scale or scope of their activity. This proposal will not impact contracts covered by the Integrated Support and Assurance Process (ISAP), which applies where there is a commissioning decision to develop a new, longer-term service contract.

[4] Note that the *Addendum to the transactions guidance – for trusts forming or changing a subsidiary* is not within the scope of this guidance update process and consultation.

Transaction type	Rationale
Novel or contentious financing arrangements	Where providers propose financing arrangements that are novel, contentious or repercussive, we may decide to review the proposed arrangements to understand the level of risk trusts are exposed to. Where financing arrangements are already being considered as part of capital proposal assurance processes elsewhere within NHS England and NHS Improvement, we will not duplicate this work.
Capital proposals	The current guidance applies to capital proposals from foundation trusts deemed not to be in financial distress.[5] Proposals from NHS trusts and foundation trusts deemed to be in financial distress are covered by the capital regime.[6] To simplify our approach to reviewing capital cases, capital proposals from foundation trusts deemed not to be in financial distress will be taken out of scope of the guidance. All capital proposals will then be covered by the new capital regime. The reporting thresholds for capital proposals from foundation trusts not in distress will be set at £50 million, or £30 million for digital cases. For capital proposals currently captured by the transactions guidance, that will mean a change in reporting thresholds, which are currently based on the proportion of gross assets or revenue subject to the proposals. Reporting thresholds for NHS trusts and foundation trusts in financial distress will remain as set out in the capital regime guidance.

[5] The Department of Health and Social Care considers a foundation trust to be in financial distress if it is in financial special measures, in breach of its licence (financial or non-financial breaches) **or** in receipt of interim financing (received or planned).
[6] Capital regime, investment and property business case approval guidance for NHS trusts and foundation trusts

Proposal 1: Non organisational transactions - We propose the guidance only captures significant service contracts that we determine could expose the trusts and systems they are part of to significant incremental risk.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

Proposal 2: Non organisational transactions - We propose the guidance captures **novel, contentious or repercussive financing arrangements**.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

Proposal 3: Non organisational transactions - We propose that capital proposals for foundation trusts that are not in distress are taken out of scope of the guidance and covered instead by the **capital regime**, with delegated limits of £50 million, or £30 million for digital cases.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

Capturing some forms of collaboration

A number of the inherent risks associated with bringing together two or more organisations via mergers or acquisitions are similar to those associated with some types of collaboration.

We increasingly see cases where trusts have worked together collaboratively for a number of years and this collaboration can reduce the overall risk of bringing trusts together in the case of mergers and acquisitions. However, it can also mean that arrangements are put in place which are difficult to unwind before we have obtained assurance that the strategic rationale for long-term and in-depth partnerships has been properly considered or that the inherent risks of entering into these types of complex governance arrangements have been assessed.

We propose to capture a limited number of collaborative arrangements in the revised guidance: those collaborations which we consider may give rise to material risk for the parties involved or may be difficult to unwind in the future without introducing significant risk. In these cases we propose to evaluate the strategic rationale for the proposal, including an evaluation of the options appraisal, and ensure that the risks and long-term implications have been assessed.

The intended purpose is not to prevent trusts from collaborating, but to encourage the right level of strategic thinking before decisions are made that cannot easily be unwound.

In practice, we propose to ask trusts to engage with us if they have proposals for:

- Significant joint working at board level. By this we mean that the proposals, if implemented, would result in there being significant joint working, particularly involving the following roles (or equivalent positions in terms of core responsibilities): chair, chief executive, deputy chief executive, chief operating officer, medical director, nursing director, chief financial officer.
- The development of committees in common for which a significant proportion of strategy formulation and/or the operational management of services has been delegated from the trust boards.

In the case of joint board posts, our view is that material risk could result from attempts to exit the arrangement, due to the breadth of control of these positions, potential loss of corporate memory and difficulty in recruiting to multiple positions simultaneously.

Committees in common with material delegated responsibilities are likely to oversee transformative change between the trusts involved, and this would be difficult to unwind without causing major disruption to staff and patients.

Although these proposed arrangements will be reportable to us, we will not perform detailed work in every case. This proposal is not intended to capture all of the range of collaborative forms envisaged within the document *Working together at scale: guidance on provider collaboratives*. We expect that many provider collaboratives will be unaffected, although others – for example where significant joint leadership is proposed – may trigger a review under this guidance. We acknowledge that we may need to iterate the guidance further as it becomes clearer how trusts are intending to collaborate and the risks associated with the models adopted.

Where we do review proposals in detail, this should not be onerous for the trusts involved. We will expect trusts to be preparing proposals and/or strategic cases for their boards where they are proposing significant joint working, and we will use these documents rather than requiring new submissions where possible. We will undertake work to understand the challenges to be addressed and consider other potential options, as well as assess risks and encourage due consideration of the long-term implications of the proposals.

Proposal 4: We propose to capture **some proposals for collaboration** in the guidance, where these would be difficult to unwind without introducing significant risk or where we consider that these may give rise to material risk for the parties involved – namely in relation to significant joint working at board level and the development of committees in common with material delegated responsibilities.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about

3. New transaction tests

Overall test for transactions

We think that proposals for a transaction should meet a new overall test: **Do the deliverable benefits to patients and the wider public materially outweigh the costs and risks in the medium to long term?**

This overall test will be supported by new tests for patient and population benefits resulting from the transaction as well as revised financial tests, which are described in detail below.

The current guidance does not set out an overarching test, and assurance work has tended to focus on financial risks and benefits.

Our proposal for a new overall test is based on the following considerations:

- We need to ensure the revised guidance adequately focuses on assessing benefits for patients and the wider population.
- Patient, population and financial benefits should be considered in the round, along with any relevant wider benefits, such as those to staff.
- Our current assurance approach focuses on the impact of the transaction on providers. Its impact beyond the transacting trusts needs to be considered too. See also Section 6.

Proposal 5: We propose a new overall test: Do the deliverable benefits to patients and the wider public materially outweigh the costs and risks in the medium to long term?

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

Patient and population benefits

Our proposed overarching test reflects a greater emphasis on the opportunities to deliver patient and population benefits. Our expectation is that improvements for patients and the wider population will be a core motivation for all transactions in the future. We will require trusts to develop detailed plans for the delivery of patient benefits as part of their business cases, as standard.

Historically, we have not assessed patient benefit plans in detail other than where there has been a Competition and Markets Authority (CMA) review. In its recent decisions, the CMA has recognised the decreased role for competition in the provision of NHS healthcare, meaning that it is unlikely to review NHS transactions in future. Our proposed approach reflects a desire to retain those aspects of the CMA regulatory process that trusts and systems have told us they value.

Learning from transactions consistently shows that detailed integration planning before the transaction date is critical to ensuring successful delivery of benefits. We will publish guidance on the level of detail trusts should provide in their plans regarding patient and population benefits. This will be a guide, not a template; we do not want to encourage a tick-box approach to planning, but rather enable trusts and systems to determine the most appropriate approach for their circumstances.

Systems and providers should interpret the term 'patient and population benefits' broadly. For example, in addition to provider and individual service-level patient benefits, such as improved mortality and outcomes, we will consider improved access to services, quality stabilisation, reduced health inequalities and improved population health outcomes as relevant benefits in forming a judgement on a proposed transaction. Proposals will not have to demonstrate benefits beyond the transacting providers' patients, but we will expect plans to be ambitious for patients and the public and will seek to understand how trusts and systems have considered broader benefits and disbenefits where applicable.

Table 3 below outlines the two key requirements we propose trusts should demonstrate in their business case and supporting documents, and our expectations for each.

Table 3: Proposed overarching tests for patient and population benefits

Key question	Our expectation
Is the proposed change likely to represent a real step-change improvement in quality of services for patients?	Trusts will need to set out proposed changes to service provision in detail and link these changes to improved quality of care[7] and population health benefits if appropriate. For example, implementing a particular model of care could reduce length of stay, increase consultant sub-specialisation (which in turn could raise quality of care) or reduce mortality rates. Trusts should also be clear about any disbenefit to patients, such as a reduced service footprint, and how this is balanced by other benefits.
Is the proposed change likely to be successfully implemented within a realistic timeframe?	To demonstrate that a patient benefit will be realised, clear and thoughtful implementation plans will need to be developed and submitted to us. Plans for integrating different services should take into account matters such as workforce needs, movement of staff or patients, and clinical interdependencies.

Proposal 6: We propose to require **evidence of a step-change improvement in quality**.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

[7] The term 'quality' should be interpreted in its broadest sense in line with Care Quality Commission (CQC) domains; safe, effective, responsive, caring.

Proposal 7: We propose that **detailed planning of patient and population benefits** in advance of the transaction is required as standard.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

Financial tests

We propose a set of revised financial tests for trusts undergoing transactions, taking into account the following considerations:

- The current financial landscape needs to be reflected. The existing guidance operates under the premise of a financially strong acquirer taking over an unsustainable trust, but this is now often not the case and many trusts have limited financial headroom.
- The current test only considers the financial position of the enlarged organisation, not any wider financial benefits or disbenefits.
- The need to shift the focus of our assurance process towards the incremental benefits and costs of the transaction, albeit we still need to be assured that the transaction contributes towards a strategy that will result in a sustainable system.

The new financial tests we are proposing (in addition to an assessment of ambition – see below) are as follows:

1. **Do the transaction proposals form part of an ICS strategy that delivers system sustainability in the medium term?**
2. **Do the deliverable financial benefits of the transaction outweigh the costs over the medium term?**
3. **Is the risk of any material short-term deterioration sufficiently mitigated?**

The **first test** is designed to ensure that, where a system is not operating within its financial allocation, transaction proposals are part of a coherent system strategy to achieve sustainability.

We may need to undertake additional assurance work during or after our review of the strategic case where system medium term plans are materially inconsistent with multi-year financial allocations, or are consistent with allocations but not realistically deliverable, resulting in a likely financial gap. In these cases, we will establish whether the proposed transaction is the optimal solution to achieving system sustainability, or if there are other options that should be considered further.

Where we agree that the transaction has sound rationale, but the associated financial benefits are unlikely to be sufficient to address all of the system deficit, we will want to understand how the transaction proposals fit within a broader system strategy (with quantified financial benefits) that will lead the ICS to a sustainable footing. If the system is unable to identify a deliverable strategy to achieve sustainability, we will determine whether the transaction should proceed to full business case stage at this time. This decision, taken by our committees, will be based on factors such as our assessment of whether the proposal is the optimal solution, and our view of the level of opportunity that exists to close the remaining financial gap.

The **second test** focuses on the benefits and costs directly associated with the transaction in the medium term. We will normally consider benefits and costs over a period of three to five years, to be determined on a case by case basis depending on the nature of the planned benefits.

An adverse net financial position in the short term that can be managed within system resources may be acceptable where the transaction has longer term benefits. There should be no assumption that central funding will be available to support transactions.

The purpose of the **third test** is to identify material financial risks that could result in trust capacity being diverted from critical integration activities post transaction. To assess this, we will perform limited procedures to assess whether there is a material risk of an unplanned deterioration in finances within the first year post-transaction. We propose to gain assurance on this through:

- a focused review of financial governance, to assess the arrangements in place to identify and manage financial risks in the short term.
- analysing the trusts' underlying financial position, including limited procedures to assess historical cash trends, current trading and the year one forecast.

The exact scope for the above will depend on our assessment of risk for each transaction.

Where we identify a risk of material short term deterioration, we will determine the extent to which this can be mitigated. This may be possible within the system financial envelope, or further work may be required to demonstrate that the financial position can be recovered in the medium term. We may review trusts' medium term financial plans in order to form a view on this.

The required format of medium term plans, where we choose to assess them, is still to be determined. They could be in a standard template such as the existing long-term financial model (LTFM), or we may offer more flexibility in how these are prepared. In determining this, we will seek to balance the benefits of consistency and quality control with the desire for a process that is not unduly onerous. As part of good governance, we expect trusts to prepare robust medium term forecasts regardless of whether or not we choose to assess them.

It is important to note that, where we have reviewed a medium term financial plan and subsequently approved a transaction, this will not signify approval of the financial plan.

See Section 4 for proposals in relation to reporting accountant opinions.

Proposal 8: We propose three new financial tests for transactions (in addition to a test relating to ambition, subject to a separate consultation question):

1. Are the transaction proposals aligned to an ICS strategy that delivers system sustainability in the medium term?
2. Do the deliverable financial benefits of the transaction outweigh the costs over the medium term?
3. Is the risk of any material short-term deterioration sufficiently mitigated?

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

Assessing ambition in proposals

We intend to set the expectation that transaction proposals demonstrate a reasonable degree of ambition. By this we mean that trusts and systems need to explore opportunities to maximise the benefits from the transaction.

In practice, we will assess how boards have assured themselves that the plans are sufficiently ambitious. We will want to understand, for example, how trusts and systems have used benchmarking information such as Model Hospital or Getting it Right First Time (GIRFT) data, or peer reviews with similar organisations that have undertaken transactions.

It is important to emphasise that in assessing the level of ambition, we do not wish to encourage plans that are unachievable, but rather ensure that realistic opportunities (including those involving other services and other statutory organisations) have not been overlooked.

Proposal 9: As part of our review of the proposed benefits of a transaction, we propose to **test whether opportunities for benefits have been adequately explored**.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this

4. Reporting accountant opinions

We propose removing the requirement for trusts to commission reviews from an independent reporting accountant or expert, and instead undertake the critical elements of this work ourselves. In carrying out a transaction assurance review, we currently rely on up to four reporting accountant opinions.

Our proposal to no longer require commissioned opinions to satisfy a transaction assurance review is based on the following considerations:

- engaging reporting accountants represents a significant cost to trusts.
- the work performed by reporting accountants duplicates certain elements of the assurance work that we undertake.
- over time we have been able to develop our skills to cover a substantial part of the work covered by the opinions, such that the additional cost is no longer justified.

Trust boards may of course choose to commission any assurance work for their own purposes as they see fit. In limited cases, where the level of risk dictates that it's necessary, we may ask trusts to commission bespoke pieces of work for which we would be a joint addressee.

Valuable elements of the work underpinning the opinions will still be delivered but in a different way, as set out in Table 4.

Table 4: Proposed approach in relation to opinions

Opinion	Intended purpose	Our proposed approach
Financial reporting procedures	To understand if there are weaknesses in governance or the financial control environment.	Based on our risk assessment for the transaction, we may perform a financial governance review to determine the trusts' ability to identify and mitigate financial risk and deliver financial benefits. This will include the adequacy of financial reporting and sufficiency of information to the board to provide adequate oversight. We will consider the work of internal and external auditors to identify any material weaknesses in financial controls that could impact the transaction.
Working capital	To consider the financial resources available to the enlarged organisation to meet its liabilities as they fall due.	In line with one of our new financial tests, we will perform limited procedures to understand historical cash trends and the year one forecast.
Post-transaction implementation plan	To provide a view on the quality of planning for the proposed transaction.	The scope of this work is adequately covered by our existing assurance process.
Quality governance	To understand if there are weaknesses in the existing and proposed quality governance of the transacting trusts that could introduce risks to quality post-transaction.	We will revise the scope of this work to align more closely with transaction risks and place greater emphasis on the response to clinical due diligence findings. The work will be carried out by NHS England and NHS Improvement, as we now have greater in-house expertise to do this work.

Proposal 10: We propose that **reporting accountant opinions are no longer required**, and suggest an alternative approach (see above).

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

5. Focusing our review on what matters

Updated risk assessment

Our proposed assurance approach will be underpinned by a revised risk assessment framework[8].

The current risk assessment primarily relies on assessing proposed transactions against a series of metrics, and therefore does not take into account some risk factors that cannot be easily measured. Furthermore, our current approach tends to result in full-scope assurance reviews being undertaken for most significant transactions, even where some elements of a transaction may be lower risk.

Under the proposed new risk assessment framework, we will continue to differentiate between material (requiring self-certification) and significant (requiring an assurance review) transactions, but will consider more qualitative measures to do this. We are not proposing any changes to the reporting thresholds for transactions, with the exception that statutory transactions can no longer be classified as 'small'; that is they will always be either material or significant due to the level of risk involved. Transactions that represent more than 40% of gross assets or income will no longer automatically be determined as significant.

For significant transactions, we propose to iterate the risk assessment over time and particularly following review of the strategic case, at which point we will use it to scope the work required for the full business case. This scoping will be based on a more detailed assessment of risk than currently, such that each transaction review scope will be bespoke, reflecting the characteristics of each individual case.

Table 5 shows the key questions our proposed risk assessment framework will ask to help us capture available intelligence on the transacting trusts and identify where the main risks lie. Some new factors will be considered, such as the extent to which trusts have previously collaborated successfully.

[8] For the avoidance of doubt, we are referring here to the process that we carry out when trusts first propose a transaction to us (in which we assess the level of inherent risk so as to scope our assurance work), rather than the process through which we issue a risk rating at the end of a transaction review.

Table 5: Our proposed new risk assessment framework

	Key questions (non-exhaustive)
Size and scope	• What is the scale of the transaction, with reference to the gross assets, income and/or consideration attributable to the transaction as a proportion of that of the trust? • Can the transaction be considered novel, contentious or repercussive? • Does the transaction represent significant changes to the scope of activity? • Will the transaction lead to a breadth of activity that could be difficult to manage? • Is the transaction statutory?
Finances	• Are there concerns relating to the financial management of either trust, including the direction of travel? • Are there factors that could lead to declining financial performance?
	Key supporting metric: Use of Resources score
Quality	• Are there concerns relating to the quality or operational performance of either trust, including the direction of travel? • Are there factors that could lead to declining quality and operational performance?
	Key supporting metrics/considerations: Quality metrics underpinning NHS Oversight Framework rating, CQC rating[9], progress with CQC actions
Wider corporate factors	• Are there concerns regarding management capability and capacity to execute the transaction? • Are there concerns regarding the effectiveness of governance? • What is the degree of collaboration between the trusts at present, if relevant? Does this reduce the level of risk? • Are there any other issues that could inhibit successful integration, if relevant (eg known cultural issues)?
	Key supporting metrics/considerations: Existing enforcement action, staff survey metrics indicating cultural issues
System strategy	• Do wider system partners have concerns about the transaction proposal? • Is the transaction a key system priority and intrinsic to delivering further system improvement?

[9] CQC have recently consulted on proposed changes to their approach to regulation. Subsequent changes could impact the information we use to assess risk, so we will iterate our risk assessment framework over time to ensure it remains relevant.

Proposal 11: We propose a **new approach** to risk assessing transactions, which includes more qualitative measures.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

Increased focus on key success factors

Based on engagement with trusts that have completed transactions and the published research on transactions within and beyond the NHS, we consider that our assurance approach should examine more closely those areas that are critical to successful integration.

One way we will do this is by making comparisons with good practice that we will define in the new guidance and other documents.

Table 6 identifies those key areas we propose to give new emphasis to and how. This is not an exhaustive list of key success factors; others are covered elsewhere in this consultation or will not be subject to significant change.

Table 6: Proposed key areas of change in relation to success factors

Critical success factor	Additional areas of emphasis
Culture	We will spend more time assessing trusts' understanding of each other's cultures (derived from robust cultural assessments and due diligence), as well as the robustness of plans to develop a shared set of values and behaviours in the enlarged organisation. This work will be underpinned by specific new lines of enquiry on culture in the revised guidance. We will develop good practice guidance for trusts undergoing transactions to support these processes.
Staff engagement	We will place significantly more emphasis on ensuring that trusts have developed a range of methodologies to communicate and engage with staff, to ensure that staff are involved in developing the proposal and understand what it means for them.

Digital integration	We will consider the extent to which clinical change plans and the new operating model are underpinned by robust planning of digital and IT infrastructure enablers, and that there are clear and prioritised plans for the integration of systems.
Readiness for transformational change	We may ask trusts to circulate a short survey to selected staff groups, to elicit understanding of organisations' readiness for complex change. The responses to this survey will facilitate richer discussions with boards, rather than providing a direct measure of readiness.

Proposal 12: We propose to **seek further assurance** on a number of critical factors for successful integration (listed above), including by making **comparisons with good practice**.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

6. Role of the system

We want to reflect the increasing role of the system in our transactions assurance process.

The current guidance focuses on a transaction's impact on the providers involved. This has the potential to incentivise organisation-centric behaviours, contrary to our desire for providers to take decisions in the best interests of the public and NHS as a whole.

By 'system', we generally mean integrated care system (ICS), but for a particular transaction we may determine a broader view is needed, eg where region-wide strategies have a bearing on the proposal.

System support

We propose that system support for a transaction will be a key factor in our consideration of whether a transaction strategic case should progress to a full business case. We will expect systems (and key partners within the system) to be engaged in discussions about proposals from the very beginning.

Because we have a legal responsibility in relation to allowing statutory transactions to proceed, systems will not be able to have the final say in this regard. We will take into account system views, together with all other evidence, when coming to an overall judgement on whether a transaction should proceed.

We propose to establish the level of support for a proposed transaction by meeting system leadership at both strategic case and full business case stages. Our considerations will include the extent to which transaction proposals are rooted in system strategies.

Relevant ICS leaders and chairs will be invited to feedback sessions with the trusts involved at the end of our assurance process and will receive copies of feedback letters to the trusts.

Proposal 13: We propose to make **system support** for a proposed transaction a key consideration in our assurance process.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

Benefits and disbenefits to the system

Our proposed new overall test for transactions (see Section 3) considers not just the patient groups served by the transacting trusts, but also benefits to the wider public served by the systems in which the trusts reside.

In relation to the financial impact of a transaction, we propose to focus much less on individual provider surpluses or deficits. The transfer of a financial problem or risk from one trust to another will not influence our decision about a proposed transaction unless we are concerned it could cause significant incremental risk.

We do not want this change in approach to be onerous to systems or providers. We therefore propose that, rather than requiring system-wide benefits plans, we will:

- consider whether the service changes proposed by the trusts have any clear disbenefits to and/or impacts on patients elsewhere in the system (or in other systems).
- speak to system leaders to understand the potential for wider population benefits from the transaction, and ensure that these are built into delivery plans.
- disregard any financial benefits or disbenefits to providers that are offset elsewhere in the system, eg repatriation of patients from another trust (where no productivity improvements are anticipated or costs elsewhere cannot be taken out), or increased commissioner funding for delivering the same service specification.

Proposal 14: We propose to factor **system benefits and disbenefits** into our decision-making.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

7. Next steps and timeframes

We will consider your responses in determining how to update the guidance, and publish a response summary.

We aim to implement updated guidance and appendices from **1 April 2022**, subject to any appropriate transitional arrangements. For trusts who have been through a Strategic Case process under the existing guidance, it is likely that the FBC review will be subject to the new guidance, but we will consider this on a case by case basis.

Proposal 15: We propose to implement the guidance from **1 April 2022**, subject to any appropriate transitional arrangements.

Do you: strongly agree / agree / neither agree nor disagree/ disagree/ strongly disagree / don't know?

Please explain your answer or provide any other comments you have about this proposal.

We have undertaken an impact assessment to determine any likely impact of the proposed changes on groups with protected characteristics or groups more likely to suffer health inequalities. We have not identified any adverse impacts, but we believe an increased focus on population benefits could in certain cases have a positive impact on these groups.

Proposal 16: Do you consider that the proposed changes to the guidance are likely to have an **impact on groups with protected characteristics** or **groups more likely to suffer health inequalities**?

Yes / No / Don't know

Please explain what the likely impacts will be for particular groups.

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