Classification: Official

Publication approval reference: PAR1464_i

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

Consultation response

October 2022

Contents

1. Introduction

NHS England consulted on proposals for updating the NHS transactions guidance for trusts undertaking transactions, including mergers and acquisitions (the guidance), last updated in 2017, between 9 November and 21 December 2021.

The guidance governs the way we assure proposed transactions involving NHS trusts and foundation trusts (collectively referred to as trusts in this document).

The 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 organisation of services envisioned in the NHS Long Term Plan.

The consultation asked for 'strongly agree/agree/neither agree nor disagree/disagree/strongly disagree/don't know' responses to questions covering each proposed update, and respondents could add further comments in optional free text boxes.

The consultation asked for responses to 16 proposals covering five thematic areas:

- definition of a transaction
- new transaction tests
- reporting accountant opinions
- focusing our review on what matters
- role of systems.

18 responses were received from a number of trusts and stakeholder organisations.

We would like to thank all the organisations and individuals who responded to the consultation. The feedback has allowed us to refine the guidance to ensure it supports the success of future transactions.

2. Main themes from the consultation

This document presents an analysis of responses by theme rather than summarising the responses to each consultation question, as a number of themes ran across all responses. However, we provide individual summaries for the questions on collaboration assurance and capital proposals, where a specific response is beneficial.

We welcome the broad agreement with the proposals underpinning the revised transactions guidance, which we think will ultimately result in more successful transactions. Many helpful comments were made regarding some of the practicalities of implementing this new approach. We have carefully considered these and revised guidance and supporting documents as necessary.

2.1 Overarching theme

Overall the responses supported the principles underpinning the consultation, including the increased focus on patient and population benefits, role of systems and key transaction considerations such as culture, while reducing regulatory burden in relation to financial analysis, reporting accountant opinions and proportionality through a more refined risk assessment. A significant majority of respondents agreed or strongly agreed with each of the proposed changes.

Most of the narrative comments, both for responses indicating agreement or disagreement, concerned implementation of these principles and the related practicalities. We have captured the essence of these comments in the themes below.

Our response

We welcome the broad agreement with the intentions behind the guidance update and provide our detailed responses below to questions raised about implementation.

2.2 Assessing transactions in the round

A theme running across responses to several consultation questions was a concern that 'failure' of a particular test could result in a beneficial transaction being rejected. This

was raised, for example, in relation to the proposed tests on patient benefits, financial benefits and system support.

Our response

As with the current approach to assessing transactions, under the revised guidance we will make judgements about whether a transaction should proceed in a holistic way. This means that should one or more individual key lines of enquiry be red-rated, we will not automatically decide the transaction should not go ahead, although this will depend on the test in question and the reasons for the given rating. Our new guidance will be explicit on this point.

This approach includes our assessment of a transaction's benefits, such that a proposal will not need to demonstrate benefits in all the areas outlined in our guidance. The exception to this is that patient and population benefits will need to be central to all transactions under the new guidance.

In relation specifically to system support, although integrated care boards (ICBs) or individual organisations will not have a veto over transaction decisions, their support will be critical in forming our overall judgement.

2.3 Specificity

In response to a number of consultation questions, respondents asked for further guidance on the thresholds for reporting and assurance, including how we would make judgements; for example, on whether a contract could create 'significant' risk, and who would decide whether a financing arrangement is novel, contentious or repercussive.

Some respondents asked about what sources of evidence we may consider for our risk assessment, and how we would define a 'concern' against areas of the new risk assessment framework.

Our response

We understand the request for further clarity on reporting requirements and have added into our guidance some examples of the types of service contracts that could require an assurance approach. Because of their nature, this is more challenging for novel, contentious or repercussive financing arrangements, although over time we may be able to refer to examples based on any arrangements that we have reviewed.

For each of these transaction types, trusts and ICSs will need to maintain an ongoing dialogue with their NHS England regional team to allow the identification of transactions that may require assurance. These judgements will be made jointly between NHS England regional and central teams. We have made this clear in the new guidance.

It is important to note that, in seeking to review certain types of transaction, our aim is not to prevent risky endeavours from progressing. Rather we aim to ensure the benefits outweigh the risks and that the level of planning will help ensure success.

In relation to the new risk assessment framework, we have intentionally used broadly defined risk factors, to ensure we can develop a holistic view of a transaction's risk environment. We have decided not to change this approach.

2.4 Regulatory burden and proportionality

Respondents welcomed our intention to reduce the regulatory burden by removing reporting accountant opinions, in relation to the overall financial approach and by narrowing the scope of service contracts subject to potential review. In relation to the reporting accountants, we received several comments emphasising the importance of external assurance.

Some respondents noted the potential for the burden to be increased in other areas, particularly in relation to collaboration (we give our response to this in Section 2.8), a higher expectation for patient benefits planning (Section 2.5), system finances and new areas of focus such as culture and staff engagement.

Our response

We acknowledge that some of the consultation proposals will require a greater degree of planning. However, our view is that this level of preparation for a transaction is essential to ensure its safe execution and the delivery of benefits, regardless of our assurance requirements.

Our overall intention is to reduce the regulatory burden while increasing the value of the work we do by focusing on the right areas. Our new risk assessment framework is designed to support this, by directing our resources to areas of highest risk and taking a lighter touch for lower risk areas. For example, trusts that have already undertaken significant collaboration successfully prior to a formal transaction will likely be subject to a reduced assurance process. This framework (or the relevant elements of it) will also be applied to the other transactions types referenced in the consultation, including high-

risk contracts and novel, contentious or repercussive financing arrangements. This means that transactions subject to review will undergo an assurance process that is proportionate to their level of risk.

As noted in the consultation document, we will ensure that where more than one assurance process is applicable to a transaction proposal, we will not duplicate work across NHS England.

In relation to reporting accountant opinions, we agree that external assurance can be valuable to organisations undertaking transactions, and boards should continue to seek assurance as they see fit. The scope of this work will no longer need to meet any requirements of our assurance process, although we will consider the findings of any independent reviews shared with us. The new guidance makes this clear.

2.5 Benefits – definitions and measurement

A number of respondents commented on the need for a broad definition of patient and population benefits, the scope for which will differ depending on the characteristics of each transaction. For example, benefits from a transaction involving a highly challenged trust may arise predominantly from stabilisation of quality, and the counterfactual therefore needs to be considered.

Some respondents commented on the difficulty of measuring and assessing benefits, particularly population benefits, and also referenced the long timeframes that can be required to deliver some benefits.

Respondents agreed that the proposals provided an opportunity to better address health inequalities in line with the NHS Long Term Plan commitments, and some commented that we could consider these more explicitly as transaction benefits.

Our proposals for requiring a step-change in quality and adequate exploration of benefit opportunities both received a degree of disagreement. Some respondents were concerned about how we will define an acceptable degree of step-change or ambition. Others raised the possibility that a requirement for ambitious proposals could lead to the overstatement of expected benefits and unrealistic delivery plans.

Our response

The new guidance is explicit that we will consider a very broad view of benefits when assessing benefit proposals. This will incorporate all domains of quality, stabilisation of

existing quality (considering the counterfactual), benefits to both providers and the wider ICS/population, sustaining benefits achieved through collaboration, reduction in health inequalities and environmental sustainability improvements. This list is not exhaustive but is designed to indicate the breadth of our definition of 'benefits'.

We acknowledge that some benefits can take a long time to deliver and do not define the period over which benefits will need to be demonstrated post transaction. We will expect plans to set out expected timeframes that balance ambition with deliverability, with clear prioritisation. In some cases, we may put in place post-transaction checkpoints to understand how these plans are progressing.

We acknowledge that measurement of benefits can be difficult, particularly for certain types. We will take this into consideration in our work and take a pragmatic approach to assessing plans.

We have carefully considered the proposed tests in relation to ambition. We have moved away from referring to a 'step-change' in the new guidance, in favour of the overarching test we consulted on that the deliverable benefits to patients and the wider public need to materially outweigh the costs and risks. This does not change the requirement for proposals to centre around patient and population benefits or to be ambitious. We have focused the ambition tests on assessing the process undertaken to explore opportunities; for example, by seeking to understand how ICS partners have been engaged in identifying benefits opportunities, and how benchmarking data has been used. We agree that a balance must be struck between ambition and realism; our new tests will assess the deliverability of proposals.

We are developing detailed supporting guidance in relation to planning for patient and population benefits and our assessment of this, which we will make available to trusts and systems planning transactions.

2.6 Balancing trust and system perspectives

Respondents supported proposals to consider the impact of transactions on the system, to ensure that they are rooted in the system strategy and deliver wider system benefits. Some questioned how these considerations would be managed for transactions spanning multiple ICSs.

Respondents asked for clarification over how the priorities of the ICB and the transacting providers will be balanced, noting that ICBs and trusts have distinct legal

accountabilities. There were also questions regarding the potential need for ICS funding for transactions, and whether this may deter system support.

In relation to a new test on system financial sustainability, some respondents expressed concern that providers will be held accountable for addressing wider system problems.

Our response

We recognise some of the challenges inherent in looking beyond the transacting providers' boundaries when assessing transactions, although we strongly believe this is the right thing to do.

Our expectation is that proposals are developed that meet the needs and statutory obligations of both trusts and ICBs, such that they can optimise benefits for the population as a whole. We will expect ICBs to have a role in signing off transaction proposals.

It will remain that any financial support for the transaction needs to be met from ICB resources. The case for a transaction will need to make it clear how the benefits of the proposal to the ICS justify any financial investment required.

It is important to note that, in assessing transactions, we are not solely considering the responsibilities of the transacting trusts. Where benefits are expected beyond the patients of the transacting providers, we will want to understand the role ICS partners will play in delivering these benefits. Where the ICS is not financially sustainable, the onus will be on the ICB to demonstrate how the transaction, and any wider actions, will help to address this.

Where the impact of a proposed transaction spans more than one ICS, we will take a pragmatic approach to assessing system support, taking into account the relative expected impact on each ICS.

2.7 Capturing good practice and learning

Respondents supported the proposed increase in focus on key enablers for successful transactions, such as culture, staff engagement and digital transformation. Several noted the importance of capturing best practice in the NHS and beyond, to support providers to execute transactions successfully and deliver the benefits.

Our response

We agree it is critical to capture good practice and learning from both the successful and less successful aspects of previous transactions. We used publicly available research from the NHS, wider public sector and private sector in developing our proposals for consultation and good practice guidance.

We are in the process of trialling a new approach to post-transaction evaluation to ensure we can learn from NHS transactions systematically. We will use the findings from this work to continuously update our guidance, approach and supportive tools as necessary.

We have developed good practice guidance for culture, staff engagement, patient benefits and digital transformation, with reference to learning from past transactions and good practice beyond the NHS. We will continue to iterate these documents over time.

2.8 Assurance of some proposals for collaboration

Whilst 65% of responses agreed with this proposal, there were two consistent themes raised for consideration. Firstly, the need for any approach to be proportionate and risk-based so that it does not hinder provider collaboration or dis-incentivise trusts from entering into joint working arrangements. Secondly, to ensure any additional burden on providers was minimised.

Our response

We have reflected on responses submitted and have adapted our approach to ensure that it is proportional and does not hinder collaboration. We will work closely with systems and providers in order to identify areas of risk and opportunities for shared learning. For more complex arrangements we may work alongside system and providers to provide support and feedback to ensure that collaborative arrangements deliver benefits, learn from others and reduce risk.

2.9 Assurance of capital proposals

Respondents generally supported the proposal to cover capital transactions in the capital regime guidance so that capital guidance is in one place for all providers. Respondents asked for further clarification on delegated limits of £50 million, or £30 million for digital proposals. Respondents also questioned the approach to national

funding allocations, multi-year projects, novel commercial transactions, links to asset base or turnover and broader access to capital.

Our response below explains the rationale for the change and signposts organisations to further information on some of the broader questions on the capital regime.

Our response

Guidance on capital investment transactions for NHS foundation trusts that are deemed not to be in distress is currently set out in the transactions guidance, and subject to review thresholds and a risk assessment. This is not currently aligned with the HM Treasury delegated authority to the Department of Health and Social Care (DHSC). For Foundation Trusts not in financial distress, DHSC has set capital delegated limits of £50 million+ for non-digital capital investment and £30 million+ for digital capital investment and this will be confirmed in the 2022 capital guidance refresh when published. Delegated limits for NHS trusts and foundation trusts in financial distress will remain at £15 million. HM Treasury and DHSC also reserve the right to review and approve any proposals that are novel and contentious, or could cause significant repercussive issues.

The business case requirements, approvals and definitions of financial distress for the purposes of the capital delegated limits will be set out in the 2022 capital guidance refresh when published. We will work with providers and aim to be pragmatic as these delegated limits come into effect, eg where schemes are already at the Full Business Case stage.

The Capital guidance 2022 to 2025 provides details of the three-year capital allocation covering 2022/23 to 2024/25, to give greater certainty over system-level allocations, nationally allocated funds and other national capital investment, allowing systems to plan capital investments into the future. This guidance answers some of the broader questions from respondents on the capital regime, system allocation methodology, capital to support the NHS Long Term Plan ambitions, and the business case and approvals required to access national programme allocations.

3. Next steps

3.1 Effective date and transitional arrangements

The revised guidance for statutory transactions takes immediate effect and we have been working closely with trusts planning a transaction to ensure they are prepared for the changes. The guidance reflects the changes brought about by the Health and Care Act 2022.

This revised guidance Assuring and supporting complex change: Statutory transactions, including mergers and acquisitions has been finalised with reference to the consultation responses and we have added detail and points of clarification where necessary. Trusts should note that separate guidance is now available for various other types of complex change, including those referenced in this document. This is all accessible via the above link.

Where trusts have already started a transaction assurance process under the previous guidance, we will consider transitional arrangements on a case-by-case basis and will support trusts to transfer from the old guidance to the new, where applicable.

3.2 Preparation for implementation

We are developing a training programme to support the implementation of the guidance, which is likely to include a series of webinars for the sector. We are happy to talk to trusts and ICSs individually[1] about the new guidance in more detail.

3.3 Ongoing review

The revised guidance represents some significant changes from the previous approach and we may need to refine elements of the guidance over time to reflect feedback from trusts and our own experiences. The new approach to post-transaction evaluation referenced in Section 2.7 will support this process.

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Publication approval reference: PAR1464