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Assuring and supporting complex change

Statutory transactions, including mergers and acquisitions

October 2022

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1. Introduction

This guidance sets out the way in which NHS England supports NHS trusts or foundation trusts (collectively referred to as trusts in this document) and ICSs undertaking statutory transactions, and assures trusts' proposals for them. Its purpose is to help ensure that a proposed transaction is the right solution to the issues it is addressing and that the intended benefits will be delivered.

Our overall test is whether the deliverable benefits¹ of the transaction materially outweigh the costs and risks. We use a two-stage process to make this assessment, incorporating review of a strategic case and then full business case.

This document supersedes previous transactions guidance issued by NHS Improvement. It reflects the changing NHS landscape and shifts emphasis towards those areas that are most important to delivering a successful transaction. Under this guidance, **all transaction proposals will need to have patient and population benefits at their core and be underpinned by detailed plans for delivering those benefits.**

1.1 Impact of the Health and Care Act 2022

The Health and Care Act 2022 contains a number of provisions relevant to this guidance, which have been reflected in the document. This includes the:

- establishment of Integrated Care Boards (ICBs) and Integrated Care Partnerships (ICPs)
- transfer of legal powers in relation to transaction approval from Monitor and the Trust Development Authority to NHS England
- introduction of statutory transfer schemes between trusts (new section 69A of the NHS Act 2006)
- clarification of the FT dissolution power
- requirement for the Secretary of State for Health and Social Care to approve all transactions, including those only involving foundation trusts

¹ We take a broad view of the term 'benefits', as outlined in Section 8.

- exemption of transactions between trusts from review by the Competition and Markets Authority (CMA).

In addition to the statutory integrated care bodies created under the Act, the guidance acknowledges the increasing role of systems more broadly. ICB support for a transaction is now a key test, as is the alignment of the proposals to integrated care strategies and five year joint forward plans. Our expectation is that trusts and system partners will work together constructively in the development of transaction proposals and that trusts and ICBs will discuss and agree the nature and timing of the ICB's oversight of transaction planning. We will engage significantly with system partners throughout the assurance process to ensure we capture a range of perspectives.

1.2 Who should use this guidance?

This guidance should be used by all trusts and NHS-controlled providers², and their Integrated Care Systems (ICSs), considering any of the following statutory transactions³.

- mergers (section 56)
- acquisitions (section 56A)
- dissolutions (NHS trusts – schedule 4; foundation trusts – section 57A)
- separations (section 56B)
- transfer schemes (section 69A)

We will apply our risk assessment framework to each transaction to determine whether it is material or significant and also where the areas of highest risk are. This will dictate the level of assurance work required, as detailed in Sections 2 and 3.

Appendix 10 provides further detail on the legal aspects of statutory transactions, as well as the roles and responsibilities of directors and governors.

Trusts should speak to regional NHS England contacts if unsure whether their proposed transaction fits within the descriptions above. It is important that trusts

² NHS-controlled providers are: a) not NHS trusts or foundation trusts; b) required to hold a provider licence; and c) ultimately controlled by one or more NHS trusts and/or foundation trusts, where 'control' is defined on the basis of IFRS 10. Guidance on our oversight of NHS-controlled providers is available [here](#).

³ References to legislation relate to the National Health Service Act 2006 (NHS Act 2006) as amended, unless otherwise stated.

engage early with their regional contacts so that we can best support their transaction process.

1.3 Legal and regulatory framework

We exercise the statutory powers of NHS England in supporting, reviewing and approving transactions. The legislation dictates that we can only grant an application for a merger, acquisition, dissolution or separation where we are satisfied that trusts have taken the necessary steps to prepare for the transaction, and where the grant is approved by the Secretary of State⁴.

The CMA no longer has a role in reviewing transactions between NHS providers, including their subsidiaries. In instances where a CMA review may be a possibility, such as mergers or joint ventures involving an NHS provider and an independent provider (including GP practices), we will work with trusts and ICSs to understand and explain the requirements. Trusts should contact us in situations where it is unclear whether the CMA would have jurisdiction to review the proposed transaction.

1.4 Transition arrangements

This document incorporates several changes from the previous (2017) version of the guidance, which are outlined in [Revising the NHS transactions guidance for trusts undertaking transactions, including mergers and acquisitions: consultation response](#). Where trusts have started but not yet completed a transaction process under the previous guidance, we will consider transitional arrangements on a case-by-case basis and will support a transfer from the old guidance to the new, where applicable.

⁴ SoS approval is not required for FT dissolutions. For other transactions, we will seek the support of the Secretary of State on trusts' behalf, but trusts may be required to provide supporting information further to FBC submissions, in response to SoS requests

2. Reporting and risk assessment

2.1 Reporting

All statutory transactions are reportable to NHS England, regardless of their size.

We encourage trusts and ICSs considering a transaction to engage with us as early as possible, so that we can provide advice and support as necessary.

2.2 Risk assessment

The degree to which we scrutinise any proposed transaction depends on our assessment of the risks associated with successfully executing it and delivering the intended benefits. Once a transaction is reported to us we undertake a risk assessment to determine whether it is **material** or **significant**, as defined in Table 1. We will complete this assessment based on intelligence regarding the transaction and the trusts and ICS(s) involved.

Table 1: Transaction classification

| Classification | Definition | Assurance approach |
|--------------------|---|--|
| Material | A transaction that we deem to be lower risk, requiring us to undertake only limited assurance work. | We will review relevant documents and certifications and may ask for additional evidence to support these. We will ensure that all relevant documents have been submitted to us (see Section 6). We will not issue a transaction rating. |
| Significant | A transaction that we deem to be higher risk, requiring us to review the proposal in detail. | We will review relevant documents and certifications, as for material transactions. The transaction will also be subject to a detailed assurance process and assigned a transaction rating, which must be green or amber for the transaction to proceed. Our assurance work will be proportionate to the risks associated with the transaction. |

When we consider risk, we focus on the risk of transaction failure as opposed to business as usual risks that the transacting parties will face whether or not the transaction goes ahead (although such risks are relevant to the extent that they could indirectly lead to transaction risks). By transaction failure, we mean the failure to execute the transaction successfully or the failure to deliver significant benefits that exceed the costs in the medium to long term.

The assurance approach for each transaction classification is described further in Section 3.

For significant transactions, we will also use the risk assessment to determine the scope of our assurance work at full business case stage,⁵ in line with our risk-based approach to assurance.

We may update the risk assessment from time to time, and potentially at any stage prior to issuing a transaction rating, to ensure our assurance work aligns to the risk profile of the transaction. In particular, it is likely that we will iterate the assessment following strategic case review for significant transactions, given that we will know more about the risks at that point and other risks may have emerged or been adequately mitigated. We may change our view of the appropriate transaction classification (material or significant) based on new information about a transaction's risk profile.

We will base our determination of the overall level of risk associated with a transaction on a rounded view of the relevant risk factors. Table 2 sets out a non-exhaustive list of questions we will consider as part of our risk assessment.

⁵ The stages of our assurance approach are outlined in Section 3.

Table 2: Risk assessment framework

| Risk area | Key questions (not exhaustive) |
|--------------------------------|--|
| Size and scope | <ul style="list-style-type: none"> • 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 | <ul style="list-style-type: none"> • 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? <p>Key supporting metric: Use of resources score</p> |
| Quality | <ul style="list-style-type: none"> • 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? <p>Key supporting metrics/considerations: NHS Oversight Framework rating, CQC rating, progress with CQC actions</p> |
| Wider corporate factors | <ul style="list-style-type: none"> • 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)? <p>Key supporting metrics/considerations: Existing enforcement action, staff survey metrics indicating cultural issues, external views, intelligence from staff, board observations, etc</p> |
| ICS strategy | <ul style="list-style-type: none"> • Do system partners have concerns about the transaction proposal? • Is the transaction a key ICP/ICB priority and intrinsic to delivering further improvement across the ICS? |

3. Overview of transaction assurance process

Our assurance approach for a transaction depends on how it is classified, as outlined below.

Material transactions

Where we classify a transaction as material, we will request evidence in the form of certification that the board(s) have satisfied themselves in a number of the key areas of risk set out in Appendix 7. For certain transactions we may require additional evidence to support the certification. The certification must be submitted to and agreed with us before entering into any legally binding arrangements in relation to the transaction.

The approvals process for material transactions is outlined in Section 6.

Significant transactions

Our review of significant transactions comprises two gateway processes:

Strategic case (SC): We will require a strategic case setting out the rationale for the transaction, including why this is the preferred option, which we will assess through discussion with trust, ICB and ICP leaders and review of documentation. The purpose of our review is to determine whether there is a robust strategic rationale for the proposal before significant resource is directed towards developing a detailed case. We expect patient and population benefits to be the core motivation for every transaction.

Full business case (FBC): If we approve progression beyond the strategic case, a detailed case will then need to be developed demonstrating how the transaction will be executed, what the benefits will be and how they will be delivered. We will undertake a detailed review of this case to establish whether the trusts are well-placed to execute the transaction successfully.

In addition to the gateways above, we may put in place a **checkpoint** between SC and FBC stages, to determine whether adequate progress is being made in response to any risks or concerns identified at SC stage. This will help reduce the risk of a

transaction being deferred close to the planned transaction date, by ensuring we are sighted on potential issues earlier. The nature of the checkpoint process will depend entirely on the risks identified, but will normally be much briefer and less formal than SC and FBC reviews and should not require the production of documentation over and above what is needed for trusts' own planning.

A detailed description of each stage is provided in the following sections.

4. Strategic case

The SC will need to include an articulation of the challenges the trusts and their ICSs face, the options they have considered and the likely benefits to the population. Detailed guidance on what SCs should include is given in Appendix 3.

We expect key partners within the ICS to be engaged in discussing and developing proposals from the very beginning, rather than just being asked to comment on or approve a completed case. ICB support for a transaction will be a critical factor in our consideration of whether an SC should be allowed to progress to the next stage. We expect transaction planning processes and the SC to have received appropriate non-executive scrutiny and Board approval prior to submission to us.

Our SC review process has three core objectives:

- to determine whether there is a strong strategic rationale for the transaction
- to identify whether any current issues or risks in the transacting organisations and ICS could result in the transaction not proceeding to a successful conclusion
- to ensure there is a reasonable level of preparedness for FBC development.

An SC review typically takes four to six weeks, although may take longer for more complex transactions. The review comprises three domains; see Table 3 below for a brief summary. Appendix 1 contains a full list of the key lines of enquiry (KLoEs) within these domains, along with good practice examples, submission requirements and example red flags (see below). We may vary this approach for each transaction, based on the risk assessment described in Section 2.

Table 3: Overview of strategic case review domains

| Review domain | Brief overview of assurance work |
|--|---|
| <p>Strategic rationale</p> <p>Does the transaction make sense strategically and is it likely to deliver material benefits to the population?</p> | <p>Assessment of:</p> <ul style="list-style-type: none"> • the options appraisal process and rationale for the selected option, with clarity about how this best addresses trust and ICS challenges. • whether the transaction is likely to deliver material benefits to the population, with patient benefits being core to the strategic rationale. • how the transaction supports delivery of the integrated care strategy and five year joint forward plan, including a strategy to achieve ICS financial sustainability where applicable. • whether the transaction is likely to deliver a net financial benefit over the medium term. |
| <p>Underlying transaction risk</p> <p>Are there any material current issues that could result in the transaction not delivering the planned benefits?</p> | <p>Assessment of whether there are any current, unmitigated risks that are likely to jeopardise successful delivery of the transaction.</p> |
| <p>FBC readiness</p> <p>Is there a clear roadmap to develop a detailed business case?</p> | <p>Assessment of:</p> <ul style="list-style-type: none"> • whether there is an adequate plan for due diligence, focused on key areas of risk. • programmes, structures and processes in place to develop detailed integration and benefit plans. • plans to engage with staff and consider cultural development. |

To carry out our assurance work we will request the SC and supporting submissions, which will vary based on the nature of the transaction and we will advise trusts in advance of what they need to submit. In addition to our review of these documents, we will normally require meetings with trust and ICS leaders; for example with:

- **Transacting trusts:**
 - executive and non-executive directors
 - clinical leaders

- members of the project management team.
- **System and other:**
 - selected ICB/ICP representatives
 - CQC.

The nature of the transaction and our assessment of risk will dictate the meetings required for each review. The above list is not exhaustive.

Red flags

We may identify one or more ‘**red flags**’ during the course of review. These are issues that are significant enough that they may prevent the transaction from delivering the intended benefits and/or lead to disbenefits. Some examples are given in Appendix 1. Our identification of red flags does not necessarily mean that the transaction cannot proceed to FBC stage, but they will require particular focus should it do so.

Feedback and decision-making

Our review process is intended to be collaborative and supportive and we will communicate to trusts and ICBs whether any issues require further attention, as well as advising how transaction planning can be strengthened. We may be able to provide additional support where there is an identified need and available capacity (see Section 8.2).

Our review usually concludes with a formal meeting between us and selected leaders from the transacting parties and ICS to discuss the SC and any issues identified. After this meeting, one of our committees⁶ will make a decision regarding support for SC and progression to FBC. A SC rating will be issued; the ratings are defined in Table 4. We will write to trusts and ICBs to confirm this decision, as well as to summarise our assessment, red flags and any required actions, including if checkpoint meetings are required.

It is for the transacting trusts to decide whether or not to proceed with the transaction, but we may use enforcement powers to stop a transaction from proceeding beyond SC stage if we have significant concerns.

⁶ This will be a regional committee for lower risk transactions and a national committee for higher risk transactions (with the level of risk determined by us).

Table 4: Strategic case ratings

| SC rating | Definition |
|--------------|--|
| Green | <p>Proceed to FBC stage with minimal support and monitoring.</p> <p>The case has a strong strategic rationale, which is supported by key stakeholders. There are minimal existing risks that could jeopardise the transaction's success, or robust plans exist for mitigating key risks. There is a clear and implementable plan for developing the FBC, including detailed planning of benefits.</p> |
| Amber | <p>Proceed to FBC, but some areas require further focus.</p> <p>Further work is required to clarify the strategic case and its alignment to system or national priorities, and/or there are plans for identifying and mitigating risks and developing benefits, but we have some concerns about the parties' ability to carry out the work required for FBC stage.</p> <p>A further checkpoint may be required before FBC stage to ensure adequate progress is being made.</p> |
| Red | <p>Not ready to proceed to FBC at this stage.</p> <p>The case does not have a clear strategic rationale, and/or there are significant unmitigated risks that could have a material impact on the transaction, and/or it is unclear how a robust FBC can be developed at this time.</p> <p>Significant further work in several key areas is needed before proceeding to FBC. A revised strategic case may be required.</p> |

5. Full business case

Following approval of the strategic case, transacting parties will focus on developing detailed plans to execute the transaction and realise its intended benefits. We would expect the business case to be submitted to us once the following milestones have been completed:

- Completion of detailed due diligence.

- Development of a robust post-transaction integration plan (PTIP) that addresses risks highlighted by due diligence and sets out clear programmes of work to integrate the organisations. Guidance is available in Appendix 3.
- Development of detailed plans (service-level and/or cross-cutting) demonstrating how benefits to patients and the wider population will be realised.
- Agreement of any funding required⁷ and heads of terms.
- Board approval of the FBC and key supporting documents, including due diligence.
- Board approval of a completed board certification (see Appendix 7).

The overarching purpose of an FBC review is to determine whether the deliverable benefits of the transaction to patients and the wider public (including those derived from improved finances) materially outweigh the costs and risks in the medium to long term. We do this by considering the quality of trusts' plans and their readiness for implementing the planned benefits.

An FBC review will typically take three to four months, although this could vary significantly based on the complexity of the transaction, and comprises three domains, a summary of which is given in Table 5 below. Appendix 2 lists the KLoEs within these domains, along with good practice examples. Appendix 3 provides an indication of what an FBC may include.

As with the SC review, the scope of each FBC assurance process will depend on our assessment of risk. We will discuss our requirements and proposed scope of work with trusts as early as possible.

⁷ There is no central funding available for transactions; we expect any funding to be agreed locally with the ICB.

Table 5: Overview of FBC review domains

| Review domain | Brief overview of assurance work |
|--|---|
| <p>Quality and patient benefits delivery</p> <p>Is the transaction likely to deliver material benefits to patients and the population, and be executed without compromising patient safety?</p> | <ul style="list-style-type: none"> • Review of the clinical strategy, including its alignment to the transaction’s strategic rationale and vision. • Evaluation of detailed proposals for service-level/cross-cutting changes, including evaluation of whether plans are likely to be implemented, how they are prioritised, and their alignment with the wider strategy and vision. • Consideration of the risks identified through clinical due diligence, and proposed mitigations. • A quality governance review (normally carried out by us), focusing on execution risk and ability to deliver benefits. |
| <p>Integration delivery</p> <p>Are there robust structures, processes and plans in place to execute the transaction and integrate the organisations successfully?</p> | <p>Assessment of:</p> <ul style="list-style-type: none"> • robustness of the integration plan, with particular focus on critical enablers including: <ul style="list-style-type: none"> – cultural integration – staff engagement – digital integration – operating model development – transformation readiness • how material due diligence risks have been or will be mitigated • board and management capability, capacity, skills and experience • integration governance, risk management and resourcing arrangements, including project management • arrangements for benefit monitoring. |
| <p>Finance</p> <p>Do the financial benefits of the transaction outweigh the costs over the medium term, without material short-term deterioration?</p> | <ul style="list-style-type: none"> • Assessment of the three to five-year forecast of synergies and integration costs to determine reasonableness and deliverability. • Where applicable, consideration of whether the transaction aligns with an ICB strategy to achieve financial sustainability. • Review of the approach to identifying opportunities, eg through benchmarking, to assess the level of ambition. • Analysis of historical, current and year 1 forecast financial information. • A financial governance review (normally carried out by us), focusing on ability to mitigate short term risk and deliver benefits. To include reference to internal and external audit work where relevant. |

To carry out our assurance work we will request the FBC and supporting submissions, which will vary based on the nature of the transaction and we will advise on required submissions in advance. It is important that submissions are made according to the agreed schedule so that all parties can keep to the agreed timeline. If we do not receive the required standard of documentation by the agreed timescales, we may need to pause our assurance work until this is addressed, which could put the intended transaction timelines at risk.

In addition to our review of these documents, we will normally require meetings with trust and ICS leaders, for example with:

- **Transacting trusts:**
 - executive and non-executive directors
 - clinical leaders
 - divisional leadership teams
 - finance team members
 - members of the project management team
 - workstream leads if not covered by the above.
- **System and other:**
 - selected ICB/ICP representatives
 - CQC.

The nature of the transaction and our assessment of risk will dictate the meetings required for each review. The above list is not exhaustive.

Governance reviews

We will normally carry out reviews of both quality and financial governance. We will work with trusts to determine the most appropriate timing of this work, but it is likely to take place shortly before or at the beginning of the FBC stage.

The purpose of the **quality governance** review is to assess the extent to which boards have the information and skills required to identify and address quality risks and will continue to do so in the enlarged organisation. The work will cover three areas:

- leadership and behaviours
- data and reporting

- structures and processes.

An indicative scope is outlined in Appendix 4.

The purpose of the **financial governance** review is to assess the extent to which boards are aware (and would become aware in the future) of any financial issues, will be able to address financial issues when they arise, and will be able to deliver financial improvement following the transaction. The work will cover three areas:

- leadership and behaviours
- reporting
- financial planning and delivery.

An indicative scope is outlined in Appendix 5.

For both reviews, we will consider current processes as well as proposals for future processes in the enlarged organisation. To carry out the work, we will normally observe a board and relevant committee meetings, review a sample of papers and speak to a selection of trust officers and non-executives.

We will feed back key findings from these reviews to trusts, and will use the findings to conclude on the KLoEs set out in Appendix 2. We may also adjust the scope of our FBC review based on the findings.

Although independent reporting accountant opinions on governance are no longer required under this guidance, boards should always seek assurance as they see fit, including from independent external sources where necessary. We will take account of externally commissioned work in determining our own assurance scope and conclusions, subject to consideration of the scope and independence of such work.

Staff survey

We will encourage trusts to survey staff using a set of questions we have developed, and we will ask that results are shared with us. The purpose of the survey is to inform discussions about staff perceptions of the transaction, culture and readiness for transformational change.

The proposed questions have been designed with key enablers for transaction success in mind, but trusts should consider which questions make the most sense for

their context. We would value an early conversation about this to ensure that the survey responses will also inform key aspects of our assurance work.

Certifications

To issue a final transaction rating, we must receive a board certification and letter of management representation from trusts as outlined in Section 6, with further detail and standard wording in the appendices as referenced.

The board certification must be sent to us at the same time as the board-approved FBC, and we may request a further certification before the transaction date if there have been material changes to transaction plans.

Feedback and decision-making

Towards the end of an FBC review, we will typically schedule a challenge meeting, to give the transacting parties an opportunity to respond to any concerns we have identified. We will agree the required attendees on a case-by-case basis and will also invite key system partners as appropriate. We will advise of the format and key areas for discussion before the meeting.

After taking into account trusts' responses at the challenge meeting to any issues raised from the review, one of our committees⁸ will determine the transaction rating, as defined in Table 6. The rating must be green or amber for the transaction to proceed.

When making a decision on whether a transaction should proceed, we consider conclusions against all KLoEs in the round and in the context of our overall requirement that the deliverable benefits of the transaction must materially outweigh the costs and risks. A red-rated individual KLoE will therefore not necessarily mean that a transaction cannot go ahead, although this will depend entirely on the KLoE in question and broader context.

⁸ This will be a regional committee for lower risk transactions and a national committee for higher risk transactions (with the level of risk determined by us).

Table 6: Transaction ratings

| Transaction rating | Definition |
|--------------------|--|
| Green | <p>Proceed with minimal support and monitoring.</p> <p>Proposals and plans are largely consistent with good practice and demonstrate high levels of ambition for patients, while also being deliverable. No material concerns have arisen from the assurance review. Ongoing support and regulatory oversight in relation to the transaction specifically are expected to be limited or not required at all.</p> |
| Amber | <p>Proceed with moderate support and monitoring.</p> <p>Proposals and plans demonstrate elements of good practice and sufficient ambition for patients. Some significant issues have arisen from the assurance review that will need to be addressed to ensure the planned benefits are realised, and we have confidence that they can be addressed. There are likely to be some ongoing support and monitoring needs in relation to the transaction.</p> |
| Red | <p>Not ready to proceed at this time.</p> <p>Proposals and plans may demonstrate some elements of good practice. However, issues arising from the assurance review are serious enough to delay the transaction, because the deliverable benefits do not materially outweigh the costs and risks, or are not clearly articulated, and/or we do not currently have confidence that the planned benefits will be realised. The issues will need to be addressed before we consider the proposals further. If the issues are not addressed, we will use our regulatory powers to stop the transaction if required.</p> |

6. Certifications and approvals

This section outlines the certifications, approvals and legal documents required for mergers and acquisitions. The requirements differ slightly between mergers and acquisitions and trusts should refer to Appendix 10 for full details of the legal requirements. Appendix 10 also details the legal requirements for other types of statutory transaction.

Necessary steps to prepare for a statutory transaction

Legislation dictates that we can only grant an application for a merger, acquisition, dissolution or separation where:

- we are satisfied that trusts have taken the necessary steps to prepare for the transaction; and
- the grant is approved by the Secretary of State (except for FT dissolutions)

Table 7 below sets out our view of what constitutes ‘the necessary steps’ for material and significant statutory transactions.

Table 7: Necessary steps to prepare

| Classification | Necessary steps to prepare for transaction |
|--------------------|---|
| Material | <ul style="list-style-type: none">• All relevant documents for a statutory transaction have been submitted.• All certifications have been submitted and we are satisfied with them. |
| Significant | <ul style="list-style-type: none">• All relevant documents for a statutory transaction have been submitted.• All certifications have been submitted and we are satisfied with them.• The transaction has been through our detailed review and given a transaction rating of green or amber. |

Documentation requirements

Table 8 shows the certifications and statements we require to be able to complete our assurance work, based on whether the transaction is material or significant.

In the case of significant transactions, we will need to receive the board certification alongside the FBC. We require the management letter of representation in advance of issuing a final transaction rating but as close to the proposed transaction date as possible. In relation to the board certification, we may ask trusts to re-certify before the transaction date if there have been material changes to transaction plans.

Table 8: Certifications required to complete assurance work

| Requirement | Material | Significant | Reference |
|---|----------|-------------|------------|
| Board certification (and supporting minutes/papers) | Y | Y | Appendix 7 |
| Management letter of representation | N | Y | Appendix 8 |

Table 9 shows the certifications and statements we require to be able to grant a statutory transaction, based on whether the transaction is material or significant. For material transactions, trusts may proceed to this stage once we are content with the board certification referenced above. For significant transactions, transacting parties may proceed to this stage once we have issued an amber or green transaction rating.

Table 9: Documents required to grant a statutory transaction

| Requirement | Material | Significant | Reference |
|--|--------------|--------------|-------------|
| Evidence of approval of the transaction by the boards of the trusts involved | Y | Y | N/A |
| Joint application (to include the documents below) | Y | Y | Appendix 9 |
| Written acknowledgement of the transaction rating | N | Y | Appendix 9 |
| Foundation trusts: Evidence of approval of the transaction by a majority of the governors of the trusts involved | Y | Y | Appendix 10 |
| Foundation trust acquirer: Proposed constitution for the enlarged trust | Y | Y | Appendix 10 |
| Mergers: Details of the property and liabilities being transferred to the new foundation trust | Y | Y | Appendix 10 |
| Transaction agreement ⁹ | See footnote | See footnote | Appendix 10 |

⁹ Not mandatory, but parties may wish to enter into such an agreement. See Appendix 10.

7. Post-transaction process

Monitoring

Once a transaction is complete, we will continue to monitor trusts and their ICSs in line with the NHS Oversight Framework.

For a significant transaction with an amber transaction rating, we may enhance our post-transaction monitoring process and will discuss these arrangements with trusts and ICSs during the approval stage. Such arrangements are likely to include checkpoints at agreed intervals after the transaction, at which we would determine the extent to which key areas of residual risk are being addressed. Where put in place, these checkpoints will be regionally led within NHS England, with support from national teams.

Evaluation and learning

A key part of our role is to disseminate learning on transactions across the sector, and we want to ensure that our assurance processes reflect this learning too.

We will invite trusts to participate in a feedback session with the FBC assurance team about one month after the transaction date, to capture feedback about this guidance, the assurance process, any learning arising from the first month post-transaction and the process of enacting the transaction.

Trusts that have completed transactions will be also invited to participate in longer-term evaluation work, to help us capture good practice and learning to share with the wider sector. Within this we will consider trusts' own evaluation work as well as wider reflections on transaction implementation. We will aim to capture themes from trusts that are at a variety of points in their transaction journey, meaning that the timing of this follow-up work will be determined on a case-by-case basis in discussion with the trusts.

These learning processes will be kept separate from any monitoring arrangements, so as to promote openness and candour.

8. Guidance and support

8.1 Guidance for SC and FBC stage

This section contains high-level guidance in relation to the three domains of our FBC assurance process, and trusts and ICSs should refer to this from the start of their transaction process. References to more detailed guidance are given below where relevant. We will seek to refine and expand this guidance over time using the learning from our post-transaction evaluation processes.

The following appendices contain further guidance that trusts should refer to:

- Appendix 1: Strategic case KLoEs, good practice and red flags
- Appendix 2: FBC KLoEs and good practice
- Appendix 3: Submission guidance
- Appendix 6: Due diligence guidance and indicative scopes.

Quality and patient benefits

Proposals must demonstrate that improvements for patients and the wider population are a core motivation for transactions, and trusts will need to develop detailed plans for the delivery of patient benefits as part of their business cases, as standard. Learning from transactions consistently shows that detailed integration planning before the transaction date is key to ensuring successful delivery of benefits.

The term ‘improvements’ above should be interpreted broadly. For example, in addition to provider and individual service-level patient benefits, such as improved mortality and outcomes, we would consider improvements to service access, quality stabilisation or improvement, sustaining benefits from collaboration, patient/user experience benefits, reduced health inequalities, workforce benefits, environmental sustainability benefits and improved population health outcomes as relevant benefits in forming a judgement on a proposed transaction. We acknowledge that measurement of some of these types of benefits can be difficult and will be pragmatic in our consideration of these.

Improvements can be in relation to the wider population, not necessarily just patients served by the transacting providers. It will not be essential that all proposals

demonstrate benefits beyond the transacting providers' patients. However, we will expect plans to be ambitious for patients and the public, and will seek to understand how trusts and ICSs have considered broader benefits where applicable. It is not solely for the transacting trusts to identify wider system benefits – system partners should be working collaboratively to maximise a transaction's potential to deliver benefits.

We want trusts and ICSs to be ambitious for their patients and populations, but also realistic. We will assess deliverability as part of our assurance approach, including through reference to track record where applicable.

We have developed further guidance on how trusts should go about developing patient and population benefits, including the level of detail they should seek to produce. We will share this with trusts and ICSs considering a transaction.

Integration delivery

Our assurance work on integration delivery covers a number of areas that we believe are key enablers to the successful execution of a transaction and delivery of the intended benefits. The FBC KLoEs at Appendix 2 include some examples of expected and good practice in these areas. We have also developed more detailed guidance in relation to the areas below, which we will share with trusts and ICSs considering a transaction:

- guidance on cultural integration and staff engagement
- guidance on digital integration.

Trusts will need to ensure that there is a smooth transition of insurance cover, and should contact NHS Resolution¹⁰ early in the process in this respect.

Finance

Incremental benefits and short-term risk

The financial tests focus on the benefits and costs directly associated with the transaction in the medium term,¹¹ and the risk of a material unplanned financial deterioration within the first year post-transaction. Our work for the latter test will

¹⁰ contributions@resolution.nhs.uk

¹¹ 'Medium term' will normally mean three years. Where the majority of transaction benefits are expected to be delivered over a longer period, we may require plans beyond three years. We will discuss this with trusts as part of planning and scoping.

include review of some historical, current year and forecast information relating to income and expenditure, balance sheet and cash flow.

Where this work identifies material risks, we may ask trusts to submit medium-term forecasts, reviewed by the board(s), to us so that we can assess the likely longer-term impact of these risks on the financial position. We will provide trusts with a simple template to do so. Our view is that it is good practice to prepare medium-term forecasts for all transactions, regardless of what our assurance process requires, and we will expect a summary of these forecasts to be presented in the FBC.

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.

An adverse net financial position in the short term may be acceptable to us where the transaction has longer-term benefits and where this short-term deterioration can be managed within system resources.

There is no central funding available for transactions; we expect any funding to be agreed locally with the ICB.

ICS finances

Where a transaction is proposed within a financially unsustainable ICS, we will (predominantly at SC stage) also look at the extent to which the transaction forms part of an ICB strategy that delivers ICS sustainability in the medium term. Where this test applies, the trusts will not be solely accountable for addressing a wider system issue. Rather we will engage with the ICB in making our assessment. The review will consider whether the proposed transaction is the optimal solution to achieving ICS 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 the ICS deficit, we will want to understand how the transaction proposals fit within a broader ICB strategy (with quantified financial benefits) that will lead the ICS to a sustainable footing. If the ICB is unable to identify a deliverable strategy to achieve sustainability, we will determine whether the transaction should proceed to FBC 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.

Where providers work across multiple ICSs, we will take a pragmatic approach to deciding where to focus our work, taking into account the relative significance of funding flows from each ICS.

8.2 Support

We recognise that transactions are a significant undertaking, and trusts and ICSs may need help with their development. The level of support that we offer will differ from transaction to transaction, based on the level of risk, available capacity and the urgency with which we and the ICB believe the transaction needs to proceed. We cannot guarantee the availability of support.

Support could be provided before SC, between SC and FBC or after a transaction. We anticipate that support will almost always be voluntary, but it is possible that it could be mandated using the provider licence in some instances.

Types of support

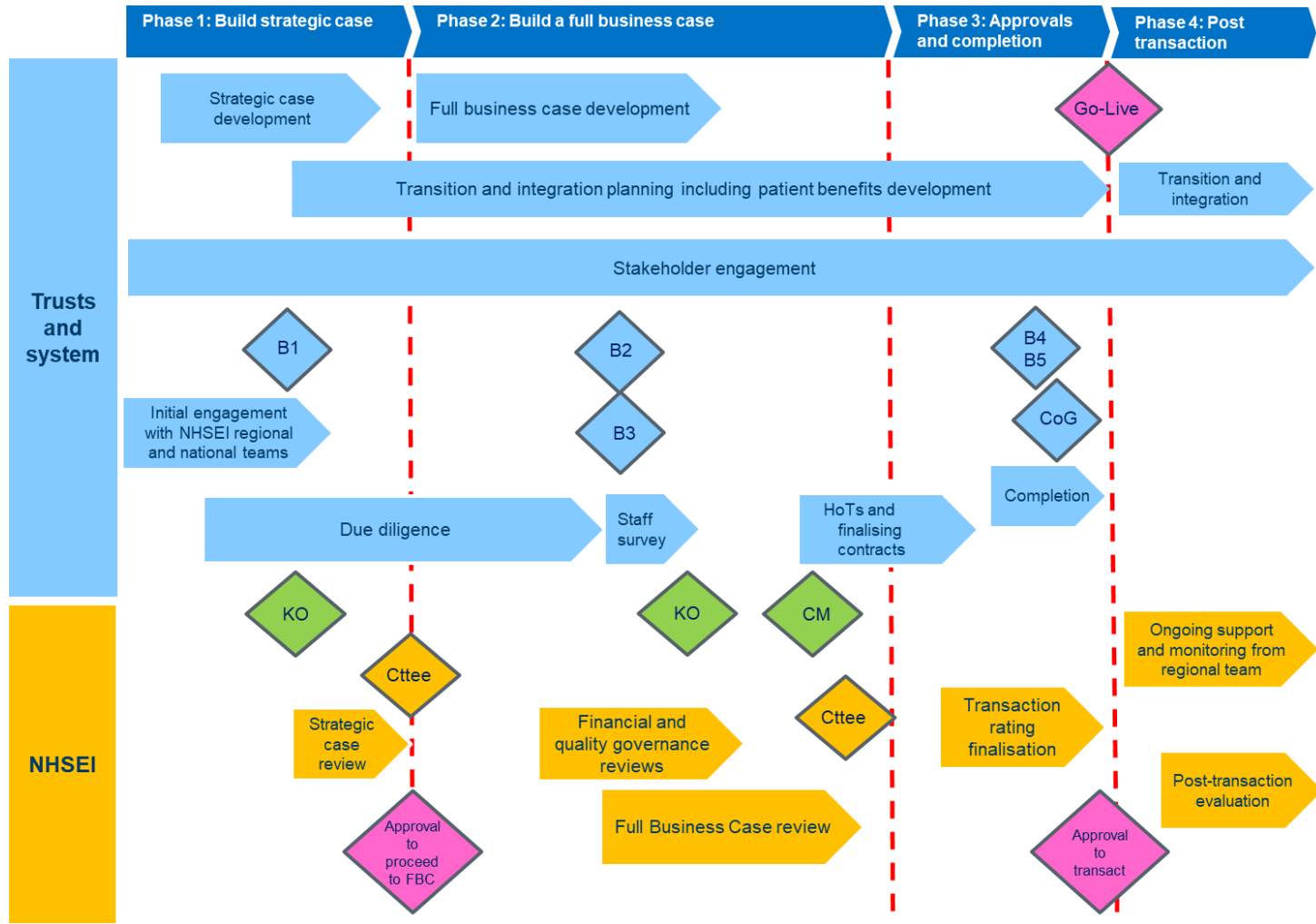
In addition to providing the guidance outlined above, we may be able to provide support in the following areas (not an exhaustive list):

- in developing the strategic rationale for a transaction
- in developing the detail of benefits to be delivered. This is most likely to involve early advice on how to bring clinicians together to develop benefits, and reviewing draft documents to provide timely feedback
- other support or advisory work prior to transaction, for example in relation to specific areas of risk identified during our SC review
- post-transaction support, for example in ensuring that the planned benefits are realised, or independent reviews of specific areas of the enlarged organisation (eg new quality or financial governance arrangements), to provide assurance to the board.

Managing conflicts

Our provision of support to trusts could result in a conflict of interest where an assurance review is later required. We will manage such conflicts by ensuring senior staff involved in supporting trusts are not included in SC or FBC review teams.

9. Indicative timeline



Notes:

- ◆ Milestone meetings between trusts/system and NHSEI:
 - KO = Kick off meeting
 - CM = Challenge meeting
- ◆ Key approval meetings at NHSEI (regional or national committee based on risk level):
- ◆ Key approval meetings at trust:
 - B1 = Board approval of SC for submission to NHSEI
 - B2 = Board approval of FBC for submission to NHSEI
 - B3 = Board approval of Board certification
 - B4 = Board decision to approve transaction
 - B5 = Board approval of management letter of representation
 - CoG = Council of Governors formal vote on the transaction (for FTs)
- ◆ Milestone to proceed

Phases and bars are not to scale and timelines for transactions will vary significantly.

As a guide, we would generally expect the entire process (from the inception of the idea to a transaction date) to take about two years, with roughly half this time being the period between SC and FBC stages.

This could be less for trusts that are already collaborating significantly, or more for complex transactions, for example where they form part of a wider system reconfiguration programme.

10. List of appendices

| | |
|----|---|
| 1 | Strategic case KLoEs, good practice and example red flags |
| 2 | FBC KLoEs and good practice |
| 3 | Submission guidance |
| 4 | Indicative quality governance review scope |
| 5 | Indicative financial governance review scope |
| 6 | Due diligence guidance and indicative scopes |
| 7 | Board certification |
| 8 | Management letter of representation |
| 9 | Example application letter |
| 10 | Legal and regulatory requirements for transactions |

The appendices can be found at [Assuring and supporting complex change: Statutory transactions, including mergers and acquisitions.](#)

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