# NHS England's transactions guidance – Assuring and supporting complex change: statutory transactions, including mergers and acquisitions

On 11 October NHS England (NHSE) published its updated transactions guidance, alongside ten appendices and its response to the consultation on the guidance. This briefing summarises the content of the guidance and includes NHS Providers' view. To share your views or any questions you may have, please contact our policy advisor for regulation Mariya Stamenova (mariya.stamenova@nhsproviders.org).

## Overview of contents

This document supersedes the previous transactions guidance issued by NHS Improvement in November 2017. It reflects recent changes to the NHS landscape, particularly the impact of the 2022 Health and Care Act including the introduction of statutory integrated care systems (ICSs), and transfers of legal powers from Monitor and the NHS Trust Development Authority to NHSE. Under the new 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. It introduces an expectation that trusts and system partners will work together constructively in the development of transaction proposals.

The guidance states that all statutory transactions are reportable to NHSE, regardless of their size. As per legislation (National Health Service Act 2006), these are:

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

This guidance sets out how NHSE will support NHS trusts, foundation trusts and ICSs which consider and undertake statutory transactions, and explains how NHSE will assure trusts' proposals for statutory transactions.

It follows a period of consultation from October to December 2021 on proposed changes to the guidance.

## Risk assessment

NHSE will use its risk assessment framework to determine whether a transaction is "material" (lower risk) or "significant" (higher risk), and where the areas of highest risk are. When considering risk, NHSE will focus on the risk of transaction failure – failure to execute the transaction successfully or to deliver significant benefits that exceed the costs in the medium to long term – as opposed to business as usual risks.

## Transaction assurance process

For transactions classified as material, NHSE will request evidence in the form of certification that the board or boards taking part have satisfied themselves in a number of key areas of risk.

For transactions classified as significant, NHSE's review will comprise of two gateway processes:

Strategic case (SC) – setting out the rationale for the transaction, including why this is the preferred option.

- This will be assessed through discussion with trust, integrated care board (ICB) and integrated care partnership (ICP) leaders and review of documentation.
- NHSE will expect key partners within the ICS to be engaged in discussing and developing proposals from the very beginning, rather than simply commenting on or approving a completed case. ICB support for a transaction will be a critical factor in NHSE's consideration of whether an SC should be allowed to progress to the next stage.
- The review process is intended to be collaborative and supportive and NHSE may be able to provide additional support to trusts and ICBs.
- The review will usually conclude with a formal meeting to discuss the SC and any issues identified.
- After this meeting, an NHSE regional or national committee will make a decision regarding support for the SC. A green, amber or red SC rating will be issued to determine whether the case can proceed to the next stage.
- An SC review will typically take four to six weeks, although may take longer for more complex transactions.

Full business case (FBC) – a detailed case will need to be developed, demonstrating how the transaction will be executed, what the benefits will be and how they will be delivered.

- The overarching purpose of an FBC review is to determine whether the deliverable benefits of the transaction to patients and the wider public materially outweigh the costs and risks in the medium to long term.
- Trusts will need to develop detailed plans for the delivery of patient benefits as part of their business cases, as standard. NHSE expects that trusts and ICSs will be ambitious for their patients and populations, but also realistic. Deliverability will be assessed as part of NHSE's assurance approach.
- When considering finances, NHSE will focus on the benefits and costs directly associated with the transaction in the medium term. An adverse net financial position in the short term may be acceptable where the transaction has longer-term benefits and where this short-term deterioration can be managed within system resources. Where a transaction is proposed within a financially unsustainable ICS, NHSE will consider whether 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.
- The FBC rating will determine whether the transaction can proceed with minimal support and monitoring (green), moderate support and monitoring (amber), or whether it cannot proceed at the given time (red).
- An FBC review will typically take three to four months, although this could vary significantly based on the complexity of the transaction.

## Post-transaction process

Once a transaction is complete, NHSE will continue to monitor trusts and their ICSs in line with the system oversight framework.

The post-transaction monitoring of a significant transaction with an amber transaction rating may include enhanced arrangements, such as checkpoints at agreed intervals after the transaction, to assess key areas of residual risk. Where put in place, these checkpoints will be regionally led within NHSE, with support from national teams.

NHSE is committed to capturing feedback and disseminating learning on transactions. It may invite trusts to participate in feedback sessions and in longer-term evaluation work to capture their views on the guidance, the assurance process, any post-transaction learning and good practice that could be shared with the wider sector.

Additional detail and guidance, including on the role of trust directors and governors is included in the appendices document.

## NHS Providers view

The updated transactions guidance is a significant improvement on the previous iteration: it is simpler, easier to read, and clearly reflects the changing NHS landscape and new ways of working within systems. It represents an important development in how NHSE considers the risks and benefits of transactions trusts undertake, and rightly puts patient and population benefits at the core.

The guidance clearly sets out the changes arising from the Health and Care Act 2022. The upfront clarification that all statutory transactions are reportable to NHS England, regardless of their size, is particularly helpful in avoiding confusion. We acknowledge NHSE's intention to reduce the regulatory burden on providers while increasing the value of its work by focusing on the right areas and applying a risk-based approach to the assurance of transactions.

NHSE has taken on board many points we made on behalf of members during the consultation last year. It is welcome that our call for additional detail and defined national criteria has been addressed, alongside our ask for including a robust non-executive director (NED) scrutiny and challenge to the assurance process. We feel, however, that there could be further reference to the role of NEDs in the process of discussing and developing proposals.

We are pleased to see that NHSE has moved away from the proposal to require evidence of a 'step-change' improvement in quality, as this presented challenges in terms of definition and measurement, and risked creating unnecessary barriers to conducting transactions for other valid reasons. We welcome the broader interpretation of benefits and improvements, which could include progress in patient and service user access and experience, or in tackling health inequalities. We agree that, while trusts and ICSs should be ambitious for their patients and populations, it is also important to be realistic about the benefits transactions can deliver. We note that NHSE is developing detailed supporting guidance on planning for patient and population benefit, which trusts may find helpful.

NHSE's commitment to an iterative approach and the focus on post-transaction evaluation is also very welcome, in order to ensure that broader learning can be captured and good practice can be shared for the benefit of all parties.

The guidance rightly acknowledges the variation across ICSs, the circumstances of providers spanning multiple ICSs, and should ensure that trusts would not be held accountable for addressing system-wide issues within financially unsustainable ICSs.

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Although it is appropriate that the new guidance reflects the new NHS landscape, the central role for ICBs in approving transactions raises the possibility that ICBs do not support an optimal outcome: there is a possibility that an ICB may drive a transaction that organisations do not support, and that an ICB may be opposed to a strategically important and beneficial transaction. When assessing a transaction, NHSE should therefore be cognisant of factors such as competing priorities, conflicts of interest, local political opposition, financial pressures and challenging relationships which may otherwise obstruct a strategically important and beneficial proposal.

We understand the risk that decision-making within systems could be slowed down by the number of tiers and partners involved. We hope that ICBs' role in approving transactions will add value rather than becoming an additional layer of bureaucracy.

We note that following last year's consultation NHSE has revised its proposal to assure some forms of collaboration between trusts, and will work with trusts and systems to minimise risk and share learning, particularly where more complex arrangements are concerned. We welcome the commitment to ensuring that collaboration is not disincentivised and that burden is minimised.

As always, we are happy to work with NHS England in the future to make sure that this new guidance enables successful transactions, and that it supports providers and their partners to realise the intended patient and population benefits.

## Contact info

For any questions regarding this briefing, or to share your feedback on the guidance, please contact Mariya Stamenova, policy advisor for regulation (mariya.stamenova@nhsproviders.org).