

HEALTH AND SOCIAL CARE (COMMUNITY HEALTH AND STANDARDS) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Nhs Foundation Trusts

Failure

Section 23: Failing NHS foundation trusts

100. This section gives the Independent Regulator broad powers where an NHS foundation trust is breaching or has breached obligations under an Act or its authorisation. Under the section, the Independent Regulator may issue a warning notice, and may also require Directors or the Board of Governors to act, or to cease acting, in a particular way. The Independent Regulator also has the power to remove or suspend any or all of the directors and members of the Board of Governors, and appoint directors to act in the interim period.

Section 24: Voluntary arrangements

101. This section gives the Independent Regulator powers to intervene in the operation of an NHS foundation trust in cases of financial difficulty.
102. Under this section, the Independent Regulator has powers to require an NHS foundation trust's directors to make a proposal for a voluntary arrangement with its creditors. In addition, the Independent Regulator also has the power to require an NHS foundation trust's directors to obtain a moratorium on its business prior to the approval of a voluntary arrangement.
103. Provisions to require the directors of a company to reach a voluntary arrangement with the company's creditors, and also to obtain a moratorium over its business, are set out in detail in Part 1 of the Insolvency Act 1986. *Subsection (2)* gives the Secretary of State the powers to apply Part 1 of the Insolvency Act 1986, including related provisions of that Act, with modifications to NHS foundation trusts.

Section 25: Dissolution etc.

104. This section gives the Secretary of State the power in certain specified circumstances to dissolve an NHS foundation trust by order. The power may be exercised where an NHS foundation trust fails to comply with a notice under *sections 23 or 24*, or where an NHS foundation trust fails to implement a voluntary arrangement under *section 24*, and where the Independent Regulator considers that, despite the exercise of its powers under either of those sections, the goods and services of the NHS foundation trust remain at risk. Before an NHS foundation trust is dissolved, the Independent Regulator must consult those individuals specified by the Secretary of State. This provision is intended as a safeguard on the use of the power. Where an NHS foundation trust is dissolved

These notes refer to the Health and Social Care (Community Health and Standards) Act 2003 (c.43) which received Royal Assent on 20 November 2003

under this section, the Secretary of State may transfer any of its property, rights and liabilities to the persons listed in *subsection (3)*. The transfer is made by order.

105. *Subsection (4)* makes provision for *Schedule 3* which sets out the legal effect of any transfer of employees of a dissolved NHS foundation trust. Under the Schedule, the contract of any employee that is transferred under *section 25(3)* is not terminated. Rather, it transfers to the transferee as if it were originally made between the employee and the transferee. The employee is however, given the right to object to such a transfer. Where an employee objects in this way, his contract of employment is terminated.
106. *Subsection (6)* gives the Secretary of State the powers to apply Part 4 of the Insolvency Act 1986, which relates to the winding up of companies, with modifications to the dissolution of NHS foundation trusts.
107. *Subsection (7)* allows the Secretary of State to exercise his powers under this section where the Independent Regulator refuses to give an authorisation to a public benefit corporation.

Section 26: Sections 24 and 25: supplementary

108. This section makes further provision about modification of the Insolvency Act 1986 under *section 24*, and the transfer of property, rights and liabilities under *section 25(3)*.
109. *Subsection (3)* provides that an order made under *section 25(3)* must be exercised to secure the provision of essential NHS goods and services.
110. *Subsection (4)* requires the power in *section 25(3)* to be exercised in a way that does not result in a net loss of value to the trust. If necessary, this can be achieved through the use of the powers in section 11, which allow the Secretary to give financial assistance to NHS foundation trusts. *Subsection 4* provides for regulations to set out how to determine whether a transfer would result in a net loss of value.