



# National Health Service Act 2006

## 2006 CHAPTER 41

### PART 2

#### HEALTH SERVICE BODIES

### CHAPTER 5

#### NHS FOUNDATION TRUSTS

#### *Authorisation*

### 33 Applications by NHS trusts

- (1) An NHS trust may make an application to the regulator for authorisation to become an NHS foundation trust, if the application is supported by the Secretary of State.
- (2) The application must—
  - <sup>F1</sup>(a) .....
  - (b) be accompanied by a copy of the proposed constitution of the NHS foundation trust,and must give any further information which the regulator requires the applicant to give.
- (3) The applicant may modify the application with the agreement of the regulator at any time before authorisation is given under section 35.
- (4) Once an NHS trust has made the application—
  - (a) the provisions of the proposed constitution which give effect to paragraphs 3 to 19 of Schedule 7 have effect, but only for the purpose of establishing the initial membership of the NHS foundation trust and of the [<sup>F2</sup>council of governors] , and the initial directors, and enabling the [<sup>F2</sup>council of governors] and board of directors to make preparations for the performance of their functions,

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- (b) the NHS trust may do anything (including the things mentioned in paragraph 14 of Schedule 4) which appears to it to be necessary or expedient for the purpose of preparing it for NHS foundation trust status.

**Textual Amendments**

**F1** S. 33(2)(a) omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 159(2)**, 306(4); S.I. 2013/671, art. 2(3)

**F2** Words in s. 33(4)(a) substituted (1.10.2012) by [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 151(9)(a)**, 306(4); S.I. 2012/1831, art. 2(2)

**F34 Other applications**

.....

**Textual Amendments**

**F3** S. 34 omitted (1.7.2012) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 160(1)**, 306(4) (with s. 160(4)(7)); S.I. 2012/1319, art. 2(3)

**35 Authorisation of NHS foundation trusts**

- (1) The regulator may give an authorisation under this section—
  - (a) to an NHS trust which has applied under section 33, <sup>F4</sup>...
  - <sup>F4</sup>(b) .....
 if the regulator is satisfied as to the following matters.
- (2) The matters are that—
  - (a) the applicant's constitution will be in accordance with Schedule 7 and will otherwise be appropriate,
  - (b) the applicant has taken steps to secure that (taken as a whole) the actual membership of any public constituency, and (if there is one) of the patients' constituency, will be representative of those eligible for such membership,
  - (c) there will be a [<sup>F5</sup>council of governors], and a board of directors, constituted in accordance with the constitution,
  - (d) the steps necessary to prepare for NHS foundation trust status have been taken,
  - [<sup>F6</sup>(e) the applicant will be able to provide goods and services for the purposes of the health service in England,]
  - (f) any other requirements which the regulator considers appropriate are met.
- (3) In deciding whether it is satisfied as to the matters referred to in subsection (2)(e), the regulator must consider (among other things)—
  - (a) any report or recommendation in respect of the applicant made by [<sup>F7</sup>the Care Quality Commission],
  - (b) the financial position of the applicant.
- <sup>F8</sup>(4) .....
- (5) The regulator must not give an authorisation unless it is satisfied that the applicant has sought the views about the application of the following—

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- <sup>F9</sup>(a) .....
- (b) individuals who live in any area specified in the proposed constitution as the area for a public constituency,
- (c) any local authority that would be authorised by the proposed constitution to appoint a member of the [<sup>F10</sup>council of governors],
- (d) if the proposed constitution provides for a patients' constituency, individuals who would be able to apply to become members of that constituency,
- (e) any prescribed persons.

(6) If regulations make provision about consultation, the regulator may not give an authorisation unless it is satisfied that the applicant has complied with the regulations.

<sup>F11</sup>(7) .....

#### Textual Amendments

- F4** S. 35(1)(b) and word omitted (1.7.2012) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), [ss. 160\(2\)](#), [306\(4\)](#) (with [s. 160\(5\)](#)); [S.I. 2012/1319](#), [art. 2\(3\)](#)
- F5** Words in s. 35(2)(c) substituted (1.10.2012) by [Health and Social Care Act 2012 \(c. 7\)](#), [ss. 151\(9\)\(a\)](#), [306\(4\)](#); [S.I. 2012/1831](#), [art. 2\(2\)](#)
- F6** S. 35(2)(e) substituted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\)](#), [ss. 159\(3\)](#), [306\(4\)](#); [S.I. 2013/671](#), [art. 2\(3\)](#)
- F7** Words in s. 35(3)(a) substituted (1.4.2009) by [Health and Social Care Act 2008 \(c. 14\)](#), [s. 170\(3\)\(4\)](#), [Sch. 5 para. 83](#); [S.I. 2009/462](#), [art. 2\(1\)](#), [Sch. 1 para. 35\(bb\)](#)
- F8** S. 35(4) omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), [ss. 159\(5\)](#), [306\(4\)](#); [S.I. 2013/671](#), [art. 2\(3\)](#)
- F9** S. 35(5)(a) repealed (1.4.2008) by [Local Government and Public Involvement in Health Act 2007 \(c. 28\)](#), [s. 245\(5\)](#), [Sch. 18 Pt. 18](#); [S.I. 2008/461](#), [art. 2\(3\)](#), [Sch.](#)
- F10** Words in s. 35(5)(c) substituted (1.10.2012) by [Health and Social Care Act 2012 \(c. 7\)](#), [ss. 151\(9\)\(a\)](#), [306\(4\)](#); [S.I. 2012/1831](#), [art. 2\(2\)](#)
- F11** S. 35(7) omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), [ss. 159\(5\)](#), [306\(4\)](#); [S.I. 2013/671](#), [art. 2\(3\)](#)

## 36 Effect of authorisation

- (1) On an authorisation being given to a body corporate which is an NHS trust—
- (a) it ceases to be an NHS trust and becomes an NHS foundation trust,
  - (b) the proposed constitution has effect, and
  - (c) any order under section 25(1) is revoked.

<sup>F12</sup>(2) .....

- (3) The authorisation is conclusive evidence that the body in question is an NHS foundation trust.
- (4) Subsections (1) to (3) do not affect the continuity of the body or of its property or liabilities (including its criminal liabilities).
- (5) The validity of any act of an NHS foundation trust is not affected by any vacancy among the directors or by any defect in the appointment of any director.
- (6) An NHS foundation trust must not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and an NHS foundation

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trust's property must not be regarded as property of, or property held on behalf of, the Crown.

#### Textual Amendments

**F12** S. 36(2) omitted (1.7.2012) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 160(3)**, 306(4) (with s. 160(6)(7)); S.I. 2012/1319, art. 2(3)

### 37 Amendments of constitution

[<sup>F13</sup>(1)] An NHS foundation trust may make amendments of its constitution [<sup>F14</sup>only if—

- (a) more than half of the members of the council of governors of the trust voting approve the amendments, and
- (b) more than half of the members of the board of directors of the trust voting approve the amendments.]

[<sup>F15</sup>(2) Amendments made under this section take effect as soon as the conditions in subsection (1)(a) and (b) are satisfied.

(3) But an amendment is of no effect in so far as the constitution would, as a result of the amendment, not accord with Schedule 7.

(4) The trust must inform the regulator of amendments made under this section; but the regulator's functions do not include a power or duty to determine whether or not the constitution, as a result of the amendments, accords with Schedule 7.]

#### Textual Amendments

**F13** S. 37 renumbered as s. 37(1) (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 161(1)**, 306(4) (with s. 161(3)); S.I. 2013/160, **art. 2(2)** (with arts. 7-9)

**F14** Words in s. 37(1) substituted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 161(1)**, 306(4) (with s. 161(3)); S.I. 2013/160, **art. 2(2)** (with arts. 7-9)

**F15** S. 37(2)-(4) inserted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 161(2)**, 306(4) (with s. 161(3)); S.I. 2013/160, **art. 2(2)** (with arts. 7-9)

### <sup>F16</sup>38 Variation of authorisation

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#### Textual Amendments

**F16** S. 38 omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 159(6)**, 306(4); S.I. 2013/671, art. 2(3)

### 39 Register of NHS foundation trusts

(1) The regulator must continue to maintain a register of NHS foundation trusts.

(2) The register must contain in relation to each NHS foundation trust—

(a) a copy of the current constitution,

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- <sup>F17</sup>(b) .....
- (c) a copy of the latest annual accounts and of any report of the auditor on them,
- (d) a copy of the latest annual report,
- <sup>F18</sup>(e) .....
- <sup>F19</sup>(f) .....
- [<sup>F20</sup>(g) a copy of any order made under section 65D, 65J, 65KC, 65L or 65LA,
- (h) a copy of any report laid under section 65D,
- (i) a copy of any information published under section 65D,
- (j) a copy of any draft report published under section 65F,
- (k) a copy of any statement provided under section 65F,
- (l) a copy of any notice published under section 65F, 65G, 65H, 65J, 65KA, 65KB, 65KC or 65KD,
- (m) a copy of any statement published or provided under section 65G,
- (n) a copy of any final report published under section 65I,
- (o) a copy of any statement published under section 65J or 65KC,
- (p) a copy of any information published under section 65M.]
- (3) In relation to any time before an NHS foundation trust is first required to send an annual report to the regulator, the register must contain a list of the persons who were first elected or appointed as—
- (a) the members of the [<sup>F21</sup>council of governors],
- (b) the directors.
- (4) Members of the public may inspect the register at any reasonable time.
- (5) Any person who requests it must be provided with a copy of, or extract from, any document contained in the register on payment of a reasonable charge.

#### Textual Amendments

- F17** S. 39(2)(b) omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 159(7)**, 306(4); [S.I. 2013/671](#), art. 2(3)
- F18** S. 39(2)(e) omitted (27.3.2012 for specified purposes, 1.4.2013 in so far as not already in force) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 156(5)**, 306(1)(d)(4); [S.I. 2013/671](#), art. 2(3)
- F19** S. 39(2)(f) omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 111(11)(a)**, 306(4); [S.I. 2013/671](#), art. 2(3)
- F20** S. 39(2)(g)-(p) inserted (1.11.2012) by [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 178(5)**, 306(4); [S.I. 2012/2657](#), art. 2(2)
- F21** Words in s. 39(3)(a) substituted (1.10.2012) by [Health and Social Care Act 2012 \(c. 7\)](#), **ss. 151(9)(a)**, 306(4); [S.I. 2012/1831](#), art. 2(2)

#### [<sup>F22</sup>39A Panel for advising governors

- (1) The regulator may appoint a panel of persons to which a governor of an NHS foundation trust may refer a question as to whether the trust has failed or is failing—
- (a) to act in accordance with its constitution, or
- (b) to act in accordance with provision made by or under this Chapter.
- (2) A governor may refer a question to the panel only if more than half of the members of the council of governors voting approve the referral.

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- (3) The panel—
- (a) may regulate its own procedure, and
  - (b) may establish such procedures, and make such other arrangements, as it considers appropriate for the purpose of determining questions referred to it under this section.
- (4) The panel may decide whether, or to what extent, to carry out an investigation on a question referred to it under this section.
- (5) The panel may for that purpose, or for the purpose of carrying out such an investigation, request information or advice.
- (6) Where the panel has carried out such an investigation, it must publish a report of its determination of the question referred to it.
- (7) If a person refuses to comply with a request made under subsection (5), the report under subsection (6) may refer to the refusal.
- (8) On any proceedings before a court or tribunal relating to a question referred to the panel under this section, the court may take the panel's report of its determination of the question into account.
- (9) The regulator—
- (a) must pay expenses properly incurred by the panel, and
  - (b) must make administrative support available to the panel.
- (10) Regulations may make provision as to—
- (a) eligibility for membership of the panel;
  - (b) the number of persons that may be appointed as members;
  - (c) the terms of appointment of members;
  - (d) circumstances in which a person ceases to be a member or may be suspended.]

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**Textual Amendments**

**F22** S. 39A inserted (27.3.2012 for specified purposes, 1.4.2013 in so far as not already in force) by [Health and Social Care Act 2012 \(c. 7\)](#), [ss. 162](#), 306(1)(d)(4); S.I. 2013/160, [art. 2\(2\)](#) (with [arts. 7-9](#))

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