These notes refer to the Health and Social Care Act 2012 (c.7) which received Royal Assent on 27 March 2012

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – NHS foundation trusts and NHS trusts

Finance

Section 163 - Financial powers etc.

1028. This section amends powers relating to the financial matters of foundation trusts.

1029. The key changes are, firstly, that the taxpayer's investment in foundation trusts will be managed more explicitly through terms applied to loans, public dividend capital and guarantees of payments under externally financed development agreements. Secondly, that the financing the Secretary of State provides to foundation trusts will be subject to detailed transparency requirements. Thirdly, it updates powers on protecting property and fees in light of changes in Part 3.

1030. The first and second changes support the management of both the taxpayer investment in foundation trusts and the provision of new financing to foundation trusts under a transparent and rules-based regime. This provides an explicit and transparent way of protecting the taxpayer investment in foundation trusts from material increases in risk that may arise as a result of such events as deteriorating financial performance or significant structural changes. The conditions on finance will be set to trigger only in exceptional circumstances so that they do not affect the operational freedoms of foundation trusts.

1031. *Subsection (1)* amends section 40 of the NHS Act to require the Secretary of State to publish an annual report detailing all loans outstanding, loan transactions during the year and the terms under which those loans were let. The subsection also requires publication of similar information on other forms of finance (public dividend capital, grants and other payments) issued during the year and on public dividend capital held by foundation trusts at the year-end.

1032. Terms on the taxpayer investment in a foundation trust could include limits on borrowing to reduce risk to the taxpayer investment. Monitor can also, in its role as health sector regulator, set conditions on financial risk which restrict borrowing, in order to ensure that a provider is financially stable to fulfil its role in ensuring continuity of NHS services. This means the statutory prudential borrowing code and the borrowing limits that are calculated using that code are no longer be required so *subsections (2) and (8)* remove the relevant powers.

1033. *Subsection (6)* requires the Secretary of State to produce guidance on his powers to issue finance or guarantees and set terms conferred under sections 40 and 42 of the NHS Act as amended by this Act. The guidance will set out criteria to be applied when setting the terms and conditions of financing issued under section 40 and those that will be applied to public dividend capital under section 42(3) of the NHS Act.

1034. The guidance will cover terms and conditions for loans, public dividend capital and guarantees of payment that fall into two categories. Firstly, it will cover those terms and conditions that relate directly to the financing itself, for example the interest or dividend payable by foundation trusts on the financing, or the requirement to repay public dividend capital. Secondly, it will cover those conditions that do not directly apply to the financing, which will be designed to highlight material changes in the risks to the taxpayer investment and will be consistent with the terms that any lender would apply to financing. These may include the following and similar conditions:

- achievement of financial metrics, such as debt service cover, to give confidence of a foundation trust's ongoing ability to service debt;
- limits on additional indebtedness or preferring other creditors;
- restrictions on the use of assets to secure debt;
- restrictions on the disposal of assets;
- restrictions on material structural changes, for example, mergers, separations and acquisitions;
- restrictions on material change of business; and
- restrictions on investments or giving of guarantees.

1035. *Subsection (5)* of this section sets out the terms that the Secretary of State may attach to public dividend capital issued to a foundation trust in order to protect the value of the taxpayer's investment. These terms could limit a foundation trust's ability to provide goods or services, borrow or invest money, provide financial assistance, apply for dissolution, and apply to acquire another body.

1036. *Subsection (7)* repeals Monitor's existing powers to protect foundation trust property. Currently, a foundation trust may not dispose of any protected property without the approval of Monitor. Monitor may designate property as protected if it considers it is needed to provide services to the NHS. In future, under Part 3, Monitor as health sector regulator, could set licence conditions that will enable it to protect property required for the delivery of NHS services.

1037. *Subsection (9)* amends section 50 of the NHS Act to repeal Monitor's current power to require a foundation trust to pay an annual fee to the regulator. Instead this subsection will give Monitor a more specific and constrained ability to require foundation trusts to pay Monitor fees associated with Monitor's two permanent foundation trust-specific functions. These are: maintaining the foundation trust register and, if it decides to do so, establishing an advice panel for governors. Monitor's fee charging powers in respect of its functions as health sector regulator are addressed in the explanatory notes on Part 3.