



Health and Social Care Act 2012

2012 CHAPTER 7

PART 3

REGULATION OF HEALTH AND ADULT SOCIAL CARE SERVICES

CHAPTER 6

FINANCIAL ASSISTANCE IN SPECIAL ADMINISTRATION CASES

Establishment of mechanisms

134 Duty to establish mechanisms for providing financial assistance

- (1) Monitor must establish, and secure the effective operation of, one or more mechanisms for providing financial assistance in cases where a provider of health care services for the purposes of the NHS (referred to in this Chapter as a “provider”) is subject to—
 - (a) a health special administration order (within the meaning of Chapter 5), or
 - (b) an order under section 65D(2) of the National Health Service Act 2006 (trust special administration for NHS foundation trusts).
- (2) Mechanisms that Monitor may establish under this section include, in particular—
 - (a) mechanisms for raising money to make grants or loans or to make payments in consequence of indemnities given by Monitor by virtue of section 132 or under section 65D(12) of the National Health Service Act 2006;
 - (b) mechanisms for securing that providers arrange, or are provided with, insurance facilities.
- (3) Monitor may secure that a mechanism established under this section operates so as to enable it to recover the costs it incurs in establishing and operating the mechanism.
- (4) Monitor may establish different mechanisms for different providers or providers of different descriptions.

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- (5) Monitor does not require permission under any provision of the Financial Services and Markets Act 2000 as respects activities carried out under this Chapter.
- (6) An order under section 306 providing for the commencement of this Chapter may require Monitor to comply with the duty to establish under subsection (1) before such date as the order specifies.

135 Power to establish fund

- (1) Monitor may, for the purposes of section 134, establish and maintain a fund.
- (2) In order to raise money for investment in a fund it establishes under this section, Monitor may impose requirements on providers or commissioners.
- (3) Monitor must appoint at least two managers for a fund it establishes under this section.
- (4) A manager of a fund may be an individual, a firm or a body corporate.
- (5) Monitor must not appoint an individual as manager of a fund unless it is satisfied that the individual has the appropriate knowledge and experience for managing investments.
- (6) Monitor must not appoint a firm or body corporate as manager of a fund unless it is satisfied that arrangements are in place to secure that any individual who will exercise functions of the firm or body corporate as manager will, at the time of doing so, have the appropriate knowledge and experience for managing investments.
- (7) Monitor must not appoint an individual, firm or body corporate as manager of a fund unless the individual, firm or body is an authorised or exempt person within the meaning of the Financial Services and Markets Act 2000.
- (8) Monitor must secure the prudent management of any fund it establishes under this section.

Applications for financial assistance

136 Applications

- (1) Monitor may, on an application by a special administrator, provide financial assistance to the special administrator by using a mechanism established under section 134.
- (2) An application under this section must be in such form, and must be supported by such evidence or other information, as Monitor may require (and a requirement under this subsection may be imposed after the receipt, but before the determination, of the application).
- (3) If Monitor grants an application under this section, it must notify the applicant of—
 - (a) the purpose for which the financial assistance is being provided, and
 - (b) the other conditions to which its provision is subject.
- (4) The special administrator must secure that the financial assistance is used only—
 - (a) for the purpose notified under subsection (3)(a), and
 - (b) in accordance with the conditions notified under subsection (3)(b).

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- (5) Financial assistance under this section may be provided only in the period during which the provider in question is in special administration.
- (6) If Monitor refuses an application under this section, it must notify the applicant of the reasons for the refusal.
- (7) Monitor must, on a request by an applicant whose application under this section has been refused, reconsider the application; but no individual involved in the decision to refuse the application may be involved in the decision on the reconsideration of the application.
- (8) For the purposes of reconsidering an application, Monitor may request information from the applicant.
- (9) Monitor must notify the applicant of its decision on reconsidering the application; and—
 - (a) if Monitor grants the application, it must notify the applicant of the matters specified in subsection (3), and
 - (b) if Monitor refuses the application, it must notify the applicant of the reasons for the refusal.
- (10) In this Chapter—
 - (a) “special administrator” means—
 - (i) a person appointed as a health special administrator under Chapter 5, or
 - (ii) a person appointed as a trust special administrator under section 65D(2) of the National Health Service Act 2006, and
 - (b) references to being in special administration are to be construed accordingly.

137 Grants and loans

- (1) Monitor may not provide financial assistance under section 136 in the form of a grant or loan unless it is satisfied that—
 - (a) it is necessary for the provider—
 - (i) to be able to continue to provide one or more of the health care services that it provides for the purposes of the NHS, or
 - (ii) to be able to secure a viable business in the long term, and
 - (b) no other source of funding which would enable it do so and on which it would be reasonable for it to rely is likely to become available to it.
- (2) The terms of a grant or loan must include a term that the whole or a specified part of the grant or loan becomes repayable in the event of a breach by the provider or special administrator of the terms of the grant or loan.
- (3) Subject to that, where Monitor makes a grant or loan under section 136, it may do so in such manner and on such terms as it may determine.
- (4) Monitor may take such steps as it considers appropriate (including steps to adjust the amount of future payments towards the mechanism established under section 134 to raise funds for grants or loans under section 136) to recover overpayments in the provision of a grant or loan under that section.

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- (5) The power to recover an overpayment under subsection (4) includes a power to recover interest, at such rate as Monitor may determine, on the amount of the overpayment for the period beginning with the making of the overpayment and ending with its recovery.

Charges on commissioners

138 Power to impose charges on commissioners

- (1) The Secretary of State may by regulations confer power on Monitor to require commissioners to pay charges relating to such of Monitor's functions that relate to securing the continued provision of health care services for the purposes of the NHS.
- (2) The regulations must provide that the amount of a charge imposed by virtue of this section is to be such amount—
- (a) as may be prescribed, or
 - (b) as is determined by reference to such criteria, and by using such method, as may be prescribed.
- (3) The regulations must—
- (a) prescribe to whom the charge is to be paid;
 - (b) prescribe when the charge becomes payable;
 - (c) where the amount of the charge is to be determined in accordance with subsection (2)(b), require Monitor to carry out consultation in accordance with the regulations before imposing the charge;
 - (d) provide for any amount that is not paid by the time prescribed for the purposes of paragraph (b) to carry interest at the rate for the time being specified in section 18 of the Judgments Act 1838;
 - (e) provide for any unpaid balance and accrued interest to be recoverable summarily as a civil debt (but for this not to affect any other method of recovery).
- (4) Where the person that the regulations prescribe for the purposes of subsection (3)(a) is a provider, the regulations may confer power on Monitor to require the provider to pay Monitor the amount of the charge in question in accordance with the regulations.
- (5) Before making regulations under this section, the Secretary of State must consult—
- (a) Monitor, and
 - (b) the National Health Service Commissioning Board.
- (6) Regulations under this section may apply with modifications provision made by sections 141 to 143 in relation to charges imposed by virtue of this section.

Levy on providers

139 Imposition of levy

- (1) The power under section 135(2) includes, in particular, power to impose a levy on providers for each financial year.
- (2) Before deciding whether to impose a levy under this section for the coming financial year, Monitor must estimate—

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- (a) the amount that will be required for the purpose of providing financial assistance in accordance with this Chapter,
 - (b) the amount that will be collected from commissioners by way of charges imposed by virtue of section 138 during that year, and
 - (c) the amount that will be standing to the credit of the fund at the end of the current financial year.
- (3) Before the start of a financial year in which Monitor proposes to impose a levy under this section, it must determine—
 - (a) the factors by reference to which the rate of the levy is to be assessed,
 - (b) the time or times by reference to which those factors are to be assessed, and
 - (c) the time or times during the year when the levy, or an instalment of it, becomes payable.
- (4) Where the determinations under subsection (3) reflect changes made to the factors by reference to which the rate of the levy is to be assessed, the notice under section 143(1)(b) must include an explanation of those changes.
- (5) A levy under this section may be imposed at different rates for different providers.

140 Power of Secretary of State to set limit on levy and charges

- (1) Before the beginning of each financial year, the Secretary of State may, with the approval of the Treasury, specify by order—
 - (a) the maximum amount that Monitor may raise from levies it imposes under section 139 for that year, and
 - (b) the maximum amount that it may raise from charges it imposes by virtue of section 138 for that year.
- (2) Where the Secretary of State makes an order under this section, Monitor must secure that the levies and charges for that year are at a level that Monitor estimates will, in each case, raise an amount not exceeding the amount specified for that case in the order.

141 Consultation

- (1) This section applies where Monitor is proposing to impose a levy under section 139 for the coming financial year and—
 - (a) has not imposed a levy under that section for the current financial year or any previous year,
 - (b) has been imposing the levy for the current financial year but proposes to make relevant changes to it for the coming financial year, or
 - (c) has been imposing the levy for the current financial year and the financial year preceding it, but has not been required to serve a notice under this section in respect of the levy for either of those years.
- (2) A change to a levy is relevant for the purposes of subsection (1)(b) if it is a change to the factors by reference to which the rate of the levy is to be assessed.
- (3) Before making the determinations under section 139(3) in respect of the levy, Monitor must send a notice to—
 - (a) the Secretary of State,

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- (b) the National Health Service Commissioning Board,
 - (c) each clinical commissioning group,
 - (d) each potentially liable provider, and
 - (e) such other persons as it considers appropriate.
- (4) Monitor must publish a notice that it sends under subsection (3).
- (5) In a case within subsection (1)(a) or (c), the notice must state—
- (a) the factors by reference to which Monitor proposes to assess the rate of the levy,
 - (b) the time or times by reference to which it proposes to assess those factors, and
 - (c) the time or times during the coming financial year when it proposes that the levy, or an instalment of it, will become payable.
- (6) In a case within subsection (1)(b), the notice must specify the relevant changes Monitor proposes to make.
- (7) A notice under this section must specify when the consultation period in relation to the proposals ends; and for that purpose, the consultation period is the period of 28 days beginning with the day on which the notice is published under subsection (4).
- (8) In this section and section 142 a “potentially liable provider” means a provider on whom Monitor is proposing to impose the levy for the coming financial year (regardless of the amount (if any) that the provider would be liable to pay as a result of the proposal).

142 Responses to consultation

- (1) If Monitor receives objections from one or more potentially liable providers to its proposals, it may not give notice under section 143(1)(b) unless—
- (a) the conditions in subsection (2) are met, or
 - (b) where those conditions are not met, Monitor has made a reference to the Competition Commission.
- (2) The conditions referred to in subsection (1)(a) are that—
- (a) one or more potentially liable providers object to the proposals within the consultation period, and
 - (b) the objection percentage and the share of supply percentage are each less than the prescribed percentage.
- (3) In subsection (2)—
- (a) the “objection percentage” is the proportion (expressed as a percentage) of the potentially liable providers who objected to the proposals, and
 - (b) the “share of supply percentage” is the proportion (expressed as a percentage) of the potentially liable providers who objected to the proposals, weighted according to their share of the supply in England of such services as may be prescribed.
- (4) A reference under subsection (1)(b) must be so framed as to require the Competition Commission to investigate and report on the questions—
- (a) whether in making the proposals, Monitor failed to give sufficient weight to the matters in section 66,

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- (b) if so, whether that failure operates, or may be expected to operate, against the public interest, and
 - (c) if so, whether the effects adverse to the public interest which that failure has or may be expected to have could be remedied or prevented by changes to the proposals.
- (5) Schedule 10 (which makes further provision about references to the Competition Commission) has effect in relation to a reference under subsection (1)(b); and for that purpose—
- (a) paragraph 1 is to be ignored,
 - (b) in paragraph 5(2), the reference to six months is to be read as a reference to two months,
 - (c) in paragraph 5(4), the reference to six months is to be read as a reference to one month,
 - (d) in paragraph 7, sub-paragraphs (4) to (7) and (9) are to be ignored (and, in consequence of that, in sub-paragraph (8), the words from the beginning to “sub-paragraph (4)(c)” are also to be ignored), and
 - (e) the references to relevant persons are to be construed in accordance with subsection (6).
- (6) The relevant persons referred to in Schedule 10 are—
- (a) in paragraphs 3, 5(6) and 6(6)—
 - (i) the National Health Service Commissioning Board, and
 - (ii) the potentially liable providers who objected to the proposals, and
 - (b) in paragraph 8(10)—
 - (i) Monitor, and
 - (ii) the potentially liable providers who objected to the proposals.
- (7) In investigating the question under subsection (4)(a), the Competition Commission must have regard to the matters in relation to which Monitor has duties under this Chapter.
- (8) Regulations prescribing a percentage for the purposes of subsection (2)(b) may include provision prescribing the method used for determining a provider’s share of the supply in England of the services concerned.

143 Amount payable

- (1) Monitor must—
- (a) calculate the amount which each provider who is to be subject to a levy under section 139 for a financial year is to be liable to pay in respect of that year, and
 - (b) notify the provider of that amount and the date or dates on which it, or instalments of it, will become payable.
- (2) If the provider is to be subject to the levy for only part of the financial year, it is to be liable to pay only the amount which bears to the amount payable for the whole financial year the same proportion as the part of the financial year for which the provider is to be subject to the levy bears to the whole financial year.
- (3) The amount which a provider is liable to pay may be zero.

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- (4) Subsection (5) applies if, during a financial year in which Monitor is imposing a levy under section 139, it becomes satisfied that the risk of a provider who is subject to the levy going into special administration has changed by reference to what it was—
 - (a) at the start of the year, or
 - (b) if Monitor has already exercised the power under subsection (5) in relation to the levy in the case of that provider, at the time it did so.
- (5) Monitor may notify the provider that Monitor proposes to adjust the amount that the provider is liable to pay so as to reflect the change; and the notice must specify the amount of the proposed adjustment.
- (6) Following the expiry of the period of 28 days beginning with the day after that on which Monitor sends the notice, it may make the adjustment.
- (7) In a case within subsection (2), subsection (4) has effect as if references to the financial year were references to the part of the financial year for which the provider is to be subject to the levy.
- (8) Where a provider who reasonably believes that Monitor has miscalculated the amount notified to the provider under subsection (1) or (5) requests Monitor to recalculate the amount, Monitor must—
 - (a) comply with the request, and
 - (b) send the provider written notice of its recalculation.
- (9) Subsection (8) does not apply to a request to recalculate an amount in respect of a financial year preceding the one in which the request is made.
- (10) If the whole or part of the amount which a person is liable to pay is not paid by the date by which it is required to be paid, the unpaid balance carries interest at the rate for the time being specified in section 17 of the Judgments Act 1838; and the unpaid balance and accrued interest are recoverable summarily as a civil debt (but this does not affect any other method of recovery).

Supplementary

144 Investment principles and reviews

- (1) Monitor must prepare and publish a statement of the principles that govern its decisions, or decisions made on its behalf, about making investments for the purposes of this Chapter.
- (2) Monitor must—
 - (a) in each financial year, review the statement,
 - (b) if it considers necessary in light of the review, revise the statement, and
 - (c) if it revises the statement, publish the revised statement.
- (3) As soon as reasonably practicable after the end of each financial year, Monitor must undertake and publish a review of the operation during that year of—
 - (a) the procedure for health special administration under Chapter 5,
 - (b) the procedure for trust special administration for NHS foundation trusts under Chapter 5A of Part 2 of the National Health Service Act 2006, and
 - (c) such mechanisms as have been established under section 134.

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- (4) The purposes of the review under subsection (3)(c) are—
 - (a) to assess the operation of the mechanisms concerned,
 - (b) to assess the accuracy of the estimates given by Monitor in relation to the operation of the mechanisms,
 - (c) to assess what improvements can be made to the process for making estimates in relation to the operation of the mechanisms, and
 - (d) to review the extent of the protection which the mechanisms are required to provide.
- (5) Where a fund established under section 135 has been in operation for the whole or part of the year concerned, the review published under this section must specify—
 - (a) the income of the fund during that year, and
 - (b) the expenditure from the fund during that year.
- (6) Monitor must exclude from a review published under this section information which it is satisfied is—
 - (a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates;
 - (b) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm that person’s interests.

145 Borrowing

- (1) Monitor may—
 - (a) borrow from a deposit-taker such sums as it may from time to time require for exercising its functions under this Chapter;
 - (b) give security for sums that it borrows.
- (2) But Monitor may not borrow if the effect would be—
 - (a) to take the aggregate amount outstanding in respect of the principal of sums borrowed by it over such limit as the Secretary of State may by order specify, or
 - (b) to increase the amount by which the aggregate amount so outstanding exceeds that limit.
- (3) In this section, “deposit-taker” means—
 - (a) a person who has permission under Part 4 of the Financial Services and Markets Act 2000, or
 - (b) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act which has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12 of that Schedule) to accept deposits.
- (4) The definition of “deposit-taker” in subsection (3) must be read with—
 - (a) section 22 of the Financial Services and Markets Act 2000,
 - (b) any relevant order under that section, and
 - (c) Schedule 2 to that Act.

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146 Shortfall or excess of available funds, etc.

- (1) The Secretary of State may provide financial assistance to Monitor if the Secretary of State is satisfied that—
 - (a) there are insufficient funds available from a mechanism established under section 134, or
 - (b) the mechanism is otherwise unable to operate effectively.
- (2) If the Secretary of State is satisfied that the level of funds available from a mechanism established under section 134 exceeds the level that is necessary, the Secretary of State may direct Monitor to transfer the excess to the Secretary of State.
- (3) If the Secretary of State is satisfied that a mechanism established under section 134 has become dormant, or if a mechanism so established is being wound up, the Secretary of State may direct Monitor to transfer to the Secretary of State such funds as are available from the mechanism.