



# Health and Social Care Act 2012

## 2012 CHAPTER 7

### PART 4

#### NHS FOUNDATION TRUSTS & NHS TRUSTS

##### *Governance and management*

#### **151** **Governors**

- (1) In paragraph 7 of Schedule 7 to the National Health Service Act 2006 (public benefit corporation to have governors)—
  - (a) in sub-paragraph (1), for “a board of governors” substitute “a council of governors”, and
  - (b) in sub-paragraphs (2), (3) and (4), for “the board” substitute “the council”.
- (2) Omit paragraph 9(3) of that Schedule (requirement for at least one member of council of governors to be appointed by PCT).
- (3) For paragraph 9(7) of that Schedule (partnership organisations) substitute—

“(7) Any organisation specified in the constitution for the purposes of this sub-paragraph may appoint one or more members of the council (but no more than the number specified for those purposes in the constitution).”
- (4) After paragraph 10 of that Schedule insert—

“10A The general duties of the council of governors are—

  - (a) to hold the non-executive directors individually and collectively to account for the performance of the board of directors, and
  - (b) to represent the interests of the members of the corporation as a whole and the interests of the public.”
- (5) After paragraph 10A of that Schedule insert—

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“10B A public benefit corporation must take steps to secure that the governors are equipped with the skills and knowledge they require in their capacity as such.”

(6) After paragraph 10B of that Schedule insert—

“10C For the purpose of obtaining information about the corporation’s performance of its functions or the directors’ performance of their duties (and deciding whether to propose a vote on the corporation’s or directors’ performance), the council of governors may require one or more of the directors to attend a meeting.”

(7) In paragraph 23(4) of that Schedule (persons eligible for appointment as auditor by governors), in sub-paragraph (c), for “the regulator” substitute “the Secretary of State”.

(8) In paragraph 26(2) of that Schedule (information that must be given in annual reports etc.), after paragraph (a) insert—

“(aa) information on any occasions in the period to which the report relates on which the council of governors exercised its power under paragraph 10C.”

(9) In consequence of subsection (1)—

- (a) in sections 33(4)(a) (in each place it appears), 35(2)(c) and (5)(c), 39(3)(a), 59(1), (2)(b) and (5) and 60(1) of that Act, for “board of governors” substitute “council of governors”,
- (b) in section 60(2) and (3) and paragraphs 8 to 14, 17, 18, 20, 21, 23, 27 and 28 of Schedule 7 to that Act, for “the board” (in each place it appears) substitute “the council”,
- (c) for the cross-heading preceding paragraph 7 of that Schedule substitute “Council of Governors”,
- (d) in the cross-heading preceding paragraph 28 of that Schedule, for “board” substitute “council”, and
- (e) in paragraphs 4(2) and 5(1) of Schedule 10 to that Act, for “board of governors” substitute “council of governors”.

## **152 Directors**

(1) After paragraph 18 of Schedule 7 to the National Health Service Act 2006 insert—

“18A The general duty of the board of directors, and of each director individually, is to act with a view to promoting the success of the corporation so as to maximise the benefits for the members of the corporation as a whole and for the public.”

(2) After paragraph 18A of that Schedule insert—

“18B (1) The duties that a director of a public benefit corporation has by virtue of being a director include in particular—

- (a) a duty to avoid a situation in which the director has (or can have) a direct or indirect interest that conflicts (or possibly may conflict) with the interests of the corporation;
- (b) a duty not to accept a benefit from a third party by reason of being a director or doing (or not doing) anything in that capacity.

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- (2) The duty referred to in sub-paragraph (1)(a) is not infringed if—
    - (a) the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or
    - (b) the matter has been authorised in accordance with the constitution.
  - (3) The duty referred to in sub-paragraph (1)(b) is not infringed if acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
  - (4) In sub-paragraph (1)(b), “third party” means a person other than—
    - (a) the corporation, or
    - (b) a person acting on its behalf.”
- (3) After paragraph 18B of that Schedule insert—
- “18C (1) If a director of a public benefit corporation has in any way a direct or indirect interest in a proposed transaction or arrangement with the corporation, the director must declare the nature and extent of that interest to the other directors.
- (2) If a declaration under this paragraph proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.
- (3) Any declaration required by this paragraph must be made before the corporation enters into the transaction or arrangement.
- (4) This paragraph does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question.
- (5) A director need not declare an interest—
- (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
  - (b) if, or to the extent that, the directors are already aware of it;
  - (c) if, or to the extent that, it concerns terms of the director’s appointment that have been or are to be considered—
    - (i) by a meeting of the board of directors, or
    - (ii) by a committee of the directors appointed for the purpose under the constitution.”
- (4) After paragraph 18C of that Schedule insert—
- “18D (1) Before holding a meeting, the board of directors must send a copy of the agenda of the meeting to the council of governors.
- (2) As soon as practicable after holding a meeting, the board of directors must send a copy of the minutes of the meeting to the council of governors.”
- (5) After paragraph 18D of that Schedule insert—
- “18E (1) The constitution must provide for meetings of the board of directors to be open to members of the public.
- (2) But the constitution may provide for members of the public to be excluded from a meeting for special reasons.”

### **153 Members**

- (1) In section 61 of the National Health Service Act 2006 (representative membership), the existing text becomes subsection (1) and, in that subsection, for “An authorisation may require an NHS foundation trust to” substitute “An NHS foundation trust must”.
- (2) After that subsection insert—
  - “(2) In deciding which areas are to be areas for public constituencies, or in deciding whether there is to be a patients’ constituency, an NHS foundation trust must have regard to the need for those eligible for such membership to be representative of those to whom the trust provides services.”

### **154 Accounts: initial arrangements**

- (1) In paragraph 24 of Schedule 7 to the National Health Service Act 2006 (accounts: general), for sub-paragraph (1) substitute—
  - “(1) A public benefit corporation must keep proper accounts and proper records in relation to the accounts.
  - (1A) The regulator may with the approval of the Secretary of State give directions to the corporation as to the content and form of its accounts.”
- (2) In sub-paragraph (3) of that paragraph, in paragraph (b) for “any records” substitute “the records”.
- (3) In paragraph 25 of that Schedule (annual accounts), in sub-paragraph (1), for “the Treasury” substitute “the Secretary of State”.
- (4) After sub-paragraph (1) of that paragraph insert—
  - “(1A) The regulator may with the approval of the Secretary of State direct a public benefit corporation—
    - (a) to prepare accounts in respect of such period or periods as may be specified in the direction;
    - (b) that any accounts prepared by it by virtue of paragraph (a) are to be audited in accordance with such requirements as may be specified in the direction.”
- (5) In sub-paragraph (2) of that paragraph—
  - (a) after “annual accounts” insert “or in preparing any accounts by virtue of sub-paragraph (1A)(a)”,
  - (b) for “the Treasury” substitute “the Secretary of State”, and
  - (c) for “information to be given in” substitute “content and form of”.
- (6) In sub-paragraph (3) of that paragraph, after “annual accounts” insert “, or of any accounts to be prepared by it by virtue of sub-paragraph (1A)(a)”,.
- (7) In sub-paragraph (4) of that paragraph, in paragraph (b)—
  - (a) omit “once it has done so”, and
  - (b) at the end insert “within such period as the regulator may direct”.
- (8) After that sub-paragraph insert—

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“(4A) The corporation must send to the regulator within such period as the regulator may direct—

- (a) a copy of any accounts prepared by the corporation by virtue of sub-paragraph (1A)(a), and
- (b) a copy of any report of an auditor on them prepared by virtue of sub-paragraph (1A)(b).”

## **155 Accounts: variations to initial arrangements**

- (1) In paragraph 24 of Schedule 7 to the National Health Service Act 2006 (accounts: general), in sub-paragraph (1A), for “The regulator may with the approval of the Secretary of State” substitute “The Secretary of State may with the approval of the Treasury”.
- (2) In sub-paragraph (5) of that paragraph, for “the regulator” substitute “the Secretary of State”.
- (3) In paragraph 25 of that Schedule (annual accounts), in sub-paragraph (1), for “the regulator may with the approval of the Secretary of State” substitute “the Secretary of State may with the approval of the Treasury”.
- (4) In sub-paragraph (1A) of that paragraph, for “The regulator may with the approval of the Secretary of State” substitute “The Secretary of State may with the approval of the Treasury”.
- (5) In sub-paragraph (2) of that paragraph, for “the regulator with the approval of the Secretary of State” substitute “the Secretary of State with the approval of the Treasury”.
- (6) In sub-paragraphs (3), (4) and (4A) of that paragraph, for “the regulator”, in each place it appears, substitute “the Secretary of State”.
- (7) This section applies to such financial year as is specified in the order under section 306 that brings the preceding provisions of this section into force (and to the subsequent financial years); accordingly, this section does not affect the application of paragraphs 24 and 25 of Schedule 7 to the National Health Service Act 2006 (as amended by section 154) to the financial years preceding the specified financial year.
- (8) In subsection (7), “financial year” has the meaning given in section 275(1) of the National Health Service Act 2006.

## **156 Annual report and forward plan**

- (1) In sub-paragraph (2) of paragraph 26 of Schedule 7 to the National Health Service Act 2006 (information that must be included in annual report), after paragraph (aa) (inserted by section 151(8)) insert—
  - “(ab) information on the corporation’s policy on pay and on the work of the committee established under paragraph 18(2) and such other procedures as the corporation has on pay,
  - (ac) information on the remuneration of the directors and on the expenses of the governors and the directors,”.
- (2) After that sub-paragraph insert—

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“(2A) Before imposing a requirement under sub-paragraph (2)(b) that the regulator considers is sufficiently significant to justify consultation, the regulator must consult such persons as it considers appropriate.”

- (3) The Secretary of State may by order—
  - (a) amend sub-paragraph (2) of paragraph 26 of that Schedule so as to substitute for paragraph (b) the following—
    - “(b) such other information as may be prescribed.”, and
  - (b) repeal sub-paragraph (2A) of that paragraph.
- (4) In paragraph 27(1) of that Schedule (duty to send forward plan to regulator), for “the regulator” substitute “the Secretary of State”.
- (5) Omit section 39(2)(e) of that Act (requirement for copy of forward plan to be on register).
- (6) In paragraph 22(1) of Schedule 7, omit paragraph (e) (duty to make forward plan available to the public).

## 157 Meetings

- (1) After paragraph 27 of Schedule 7 to the National Health Service Act 2006 insert—

*“Annual meeting of members*

- 27A
- (1) A public benefit corporation must hold an annual meeting of its members.
  - (2) The meeting must be open to members of the public.
  - (3) At least one member of the board of directors of the corporation must attend the meeting and present the following documents to the members at the meeting—
    - (a) the annual accounts,
    - (b) any report of the auditor on them,
    - (c) the annual report.
  - (4) Where an amendment is made to the constitution in relation to the powers or duties of the council of governors of a public benefit corporation (or otherwise with respect to the role that the council has as part of the corporation)—
    - (a) at least one member of the council of governors must attend the next meeting to be held under this paragraph and present the amendment, and
    - (b) the corporation must give the members an opportunity to vote on whether they approve the amendment.
  - (5) If more than half of the members voting approve the amendment, the amendment continues to have effect; otherwise, it ceases to have effect and the corporation must take such steps as are necessary as a result.”
- (2) In paragraph 28 of that Schedule (meeting of council of governors to consider annual accounts and reports), the existing text of which becomes sub-paragraph (1), after that sub-paragraph insert—

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“(2) Nothing in sub-paragraph (1) prevents the council of governors from holding a general meeting more than once a year.”

(3) After that paragraph insert—

*“Combined meetings of members and governors*

28A A public benefit corporation may hold a meeting which combines a meeting under paragraph 27A with a meeting under paragraph 28.”

## **158 Voting**

(1) After paragraph 29 of Schedule 7 to the National Health Service Act 2006 insert—

*“Power to make provision about voting*

30 (1) Regulations may amend this Chapter so as to add, vary or omit provision relating to voting by members of the council of governors of a public benefit corporation that is an NHS foundation trust, by its directors or by its members.

(2) The power under sub-paragraph (1) is exercisable only in relation to provision in this Chapter that was inserted, or otherwise provided for, by Part 4 of the Health and Social Care Act 2012.”

(2) In section 64(3) of that Act (regulations under Chapter 5 of Part 2 of that Act that are subject to affirmative procedure), after paragraph (a) (but before the “or” following it) insert—

“(aa) regulations under paragraph 30(1) of Schedule 7,”.