

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Regulation of Health and Adult Social Care Services

Chapter 6 – Financial assistance in special administration cases

943. These sections require Monitor to set up effective mechanisms for providing financial assistance to providers in health special administration. This means companies in health special administration and NHS foundation trusts in trust special administration. Funding would be issued to the special administrator and could be used to finance the costs of ensuring the continuity of NHS services, both to meet the costs maintain continuity of services during a period of administration and to fund any one-off costs of securing continuity of NHS services upon exit from special administration. The intention is that providers and commissioners of such services will fund this financial assistance through financial contributions, or other financial mechanisms, determined by Monitor, for example, on the basis of risk. The Government expects that one effect of the new arrangements will be to shift the burden of funding unsustainable providers away from high-performing commissioners and providers. Under the current arrangements, the NHS has typically funded the costs of failure through the re-allocation of surplus funding, generated by efficient provision, or by clawing-back funding from allocations to commissioners. Monitor will decide the detail of the new financial mechanisms, but the Government expects it will take account of the risks presented by individual providers and the extent to which commissioners are dependent on one or very few providers for the provision of NHS services.
944. A special administrator may, during a period of special administration, use financial assistance to cover operating costs associated with maintaining continuity of services. This might include the continuing costs of operating services, costs of restructuring the provider to ensure a sustainable future organisation or any indemnities for the administrator and other relevant persons for liabilities incurred, or loss or damage sustained in connection with the exercise of the administrator's powers and duties. Restructuring costs could include, but would not be limited to, renegotiation of service contracts, restructuring of debts, or payments made to a new operator to establish viable provision.
945. The financial mechanisms are not intended to provide long-term funding for organisations experiencing temporary liquidity issues, nor are they intended to provide long-term funding for services that are otherwise uneconomic to supply at national tariff because of market factors or special service requirements. The Government envisages that providers will secure capital from other sources (eg the Foundation Trust Financing Facility or other loans) to address temporary liquidity issues. In addition, the national tariff will include a process and methodology for increasing the prices payable to a provider, in individual cases, where necessary to sustain continuity of services required by commissioners that would otherwise be uneconomic to provide.

Establishment of mechanisms

Section 134 - Duty to establish mechanisms for providing financial assistance

946. This section places Monitor under a duty to establish effective financial mechanisms to support the operation of the special administration regimes provided for foundation trusts in Chapter 5A of Part 2 of the NHS Act and for companies in Chapter 5 of this Act.
947. Monitor has the power to determine the appropriate form of financial mechanisms (for example by levying contributions to a risk pool, establishing contingent liabilities or other approach that would best fit the risks) and whether and how the mechanisms may need to be varied for different providers. As specified by *subsection (2)*, these mechanisms could include, but need not be limited to:
- providers and commissioners being required to contribute to a collective insurance scheme or ‘risk pool’; or
 - providers being required to purchase their own insurance to cover such liabilities on failure as are specified by Monitor.
948. *Subsection (3)* provides that the mechanisms may make provision for Monitor to recover the costs of setting up and running those mechanisms.
949. The financial mechanisms are exempt from any provisions of the Financial Services and Markets Act 2000 and therefore not subject to Financial Services Authority regulation. The Government considers that Financial Services Authority regulation is not necessary given the statutory duties placed on Monitor and the better regulation safeguards set out elsewhere in this Act.
950. *Subsection (6)* provides that Monitor’s duty to establish a mechanism or mechanisms may be commenced before the rest of this Chapter. This is to allow the substantial development work to be undertaken so that the financing arrangements can be delivered in a timely manner.

Section 135 - Power to establish fund

951. *Subsection (1)* enables Monitor to establish and maintain a fund for the purposes of providing financial assistance to providers in special administration and gives Monitor flexibility to determine the appropriate mechanisms (eg a risk-pool operated by Monitor and funded by contributions from providers and, subject to regulations, commissioners).
952. *Subsections (3) to (8)* impose requirements on Monitor about the management of any such fund. Monitor is required to secure the prudential management of any such fund and to appoint at least two fund managers. These could be individuals or firms but Monitor must be satisfied:
- in the case of an individual, that the individual has the appropriate knowledge and experience for managing the investments and is not disqualified under the Financial Services and Markets Act 2000, and
 - in the case of a firm, that arrangements are in place to ensure that any individual who exercises the firm’s fund manager functions, at the time of doing so, has the appropriate knowledge and experience for managing the investments.

Applications for Financial Assistance

Section 136 - Applications

953. This section provides for the process by which a special administrator can make an application for financial assistance from Monitor.

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(c.7) which received Royal Assent on 27 March 2012*

954. *Subsection (2)* enables Monitor to specify the form of the application and the supporting evidence required. Monitor is required to either grant or refuse the application.
955. *Subsection (3)* requires that Monitor notifies a successful applicant of the purpose for which the financial assistance must be used, and the conditions attached, and *subsection (4)* requires that the special administrator may not use the assistance for any other purpose and must observe the conditions.
956. *Subsection (6)* obliges Monitor to notify an unsuccessful applicant of its reasons for refusing an application. If a special administrator requests a reconsideration of any refusal, Monitor must reconsider it and may request information from the applicant for that purpose. Any reconsideration must be carried out by individuals other than those who made the original decision to refuse the application (*subsection (7)*).
957. *Subsection (9)* provides that following reconsideration of an application, Monitor must notify the applicant of its decision and successful applicants must be notified of the purpose of the assistance and any conditions attached to it. Where the applicant is unsuccessful Monitor must give reasons for the refusal.
958. Financial assistance can be provided only during the period during which a provider was in special administration, however, it could be for a shorter time than the entire period (*subsection (5)*).

Section 137 – Grants and loans

959. This section prescribes the circumstances in which Monitor is able to give financial assistance in the form of loans or grants in response to an application from a special administrator. *Subsection (1)* provides that Monitor may only grant financial assistance if it is established that it is necessary to enable a provider to continue to provide some or all of the health care services that it provides for the purposes of the NHS or to secure a viable business to secure continued access to NHS services and that there is no other source of funding available.
960. *Subsection (3)* provides that Monitor would be able to grant financial assistance in whatever manner, and on whatever terms, it considered appropriate, subject to *subsection (2)*, which provides that those terms would have to include a term requiring the whole or a part of the grant to be repaid to Monitor if there were a contravention of the other terms.
961. *Subsections (4) and (5)* provide that Monitor is able to recover overpayments in the provision of grants and loans under this section. This includes a power to recover interest on the amount overpaid.

Charges on Commissioners

Section 138 – Power to impose charges on commissioners

962. This section gives the Secretary of State the power to make regulations that would allow Monitor to require commissioners to pay charges which relate to Monitor's functions to ensure continuity of NHS services.
963. *Subsections (2) and (3)* specify what must be included in the regulations, which includes provision about how the charge would be calculated, to whom it should be paid and when. The charge may be fixed in the regulations or determined by reference to criteria set in the regulations. Where a charge is set using criteria, the regulations must require Monitor to consult before imposing the charge. Where a charge is not paid when it is due, regulations must provide for interest to be payable on that amount and allow for any unpaid balance, including interest to be recoverable as a civil debt.
964. Where the charge is payable to a provider, Monitor may require the provider to pay Monitor that amount in accordance with the regulations.

965. *Subsection (5)* requires the Secretary of State to consult Monitor and the NHS Commissioning Board before making the regulations.
966. *Subsection (6)* states that regulations under this section may provide for consultation based on the consultation provisions in sections 141 and 142 and for calculation of amounts payable based on the provisions in section 143 in relation to charges imposed by commissioners.

Levy on providers

Section 139 – Imposition of levy

967. Under Section 135, Monitor has the power to impose levies on providers for the purposes of providing financial assistance during special administration (*subsection (1)*).
968. *Subsection (2)* requires that before the beginning of each financial year and before determining any levies to be imposed for that financial year, Monitor must estimate
- The funds needed to cover the potential costs of providing financial assistance during special administration in the forthcoming financial year;
 - The amount to be collected from commissioners in each financial year; and
 - Any surplus funds that would remain at the end of that financial year.
969. Where Monitor decides to impose a levy, *subsection (3)* requires Monitor to determine the methodology for establishing the rate of the levy and when the levy would be payable. An explanation of any changes to the methodology for establishing the rate must be included in the consultation required to be carried out under section 141 on any proposed levy. Monitor is able to differentiate the levies for different providers (*subsection (5)*).

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

970. This section enables the Secretary of State, by order and subject to the approval of HM Treasury, to limit the amount that Monitor may raise through any provider levies and charges on commissioners. The intention is that this power will be used only in exceptional circumstances, if the Secretary of State considers that the total amount that Monitor proposed to raise to support the special administration regimes was excessive. An order under this section is subject to the affirmative resolution procedure.

Section 141 - Consultation

971. This and subsequent sections set out the consultation requirements in relation to proposed provider levies and the processes by which they are to be calculated. Analogous provision in relation to commissioner charges may be made through regulations made under section 138(6).
972. This section requires Monitor to consult on the proposals for provider levies. The section specifies details about the consultation process, such as the people Monitor must notify and the length of the consultation period.

Section 142 – Responses to consultation

973. This section details how Monitor is required to handle objections to the proposals raised in response to the consultation. Monitor may not implement the proposals unless certain conditions set out in *subsection (2)* are met or, if the conditions are not met, Monitor has made a reference to the Competition Commission.
974. The conditions in subsection (2) are that the percentage of providers objecting to the proposals (the objection percentage) and, where regulations provide for this, the

percentage of providers objecting to the proposals, weighted by their share of supply (the share of supply percentage) are both less than percentages prescribed by the Secretary of State in regulations. Those regulations may also provide for the method to be used in determining what is meant by “share of supply” in relation to a provider (*subsection (8)*).

975. If the conditions are not met and a reference to the Competition Commission is made, it must be made in terms that require the Commission to investigate and report on certain matters, specified in *subsection (4)*. Those matters are whether Monitor has failed to give sufficient weight to the matters to which it must have regard under section 66 in carrying out its functions and, if so, whether that failure does or might operate against the public interest and if it does, whether that could be remedied or prevented by changes to the proposals
976. **Schedule 10** applies to references made under this section, subject to the modifications set out in *subsection (5)*. The Schedule sets out the requirements and processes surrounding the reference to the Competition Commission and the Competition Commission’s determination of any reference. The Schedule also provides the process for modification of licence conditions following references to the Competition Commission – this is covered in these Notes above (after the notes on section 101).

Section 143 – Amount payable

977. *Subsection (1)* requires Monitor to calculate the amount each provider is to pay under the levy; and to notify the provider of that amount and when it will become payable for each financial year the levy is imposed. The amount payable may be pro-rated where the provider’s liability is only for part of the year (*subsection (2)*). It may also be zero (*subsection (3)*).
978. *Subsections (4) and (5)* enable Monitor to adjust the amount payable by a provider at any time, if Monitor judges that the risk of the provider going into special administration has changed since the start of the financial year or since it last adjusted the amount. Monitor may give notice of the proposed adjustment and where it does, it must specify the adjusted amount.
979. *Subsections (8) and (9)* require Monitor to recalculate the amount payable where a provider requests this, because the provider reasonably believes that the amount has been miscalculated. This provision only applies in relation to amounts payable during the current financial year, not past levies.
980. *Subsection (10)* specifies that Monitor can recover unpaid levies, including accrued interest, as a civil debt.

Supplementary

Section 144 – Investment principles and reviews

981. *Subsections (1) and (2)* relate to any investments Monitor wants to make for the purposes of providing financial assistance in special administration. A reason for Monitor making investments might be to manage the flows of money into and out of any fund it established to provide such assistance. It is likely that the flows out of a fund would be “lumpy”: in that instances where a provider was placed in special administration would be rare, but each would probably result in the drawing-down of significant proportions of the monies held in the fund. The Government anticipates that Monitor may want to take steps to smooth the impact of this “lumpiness” upon providers and commissioners.
982. *Subsection (1)* requires Monitor to prepare and publish a statement on the principles governing its decisions about investments for the purposes of providing financial assistance in special administration.

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983. *Subsection (2)* provides that Monitor must review the statement annually, revising it if necessary. If Monitor revises the statement, it must re-publish it.
984. *Subsection (3)* requires Monitor to undertake and publish an annual review of the procedure for the operation of the trust special administration regime for foundation trusts and health special administration regime for companies and the financial mechanisms supporting them.
985. *Subsection (4)* specifies the purposes of such a review. Where the fund has been in operation in the year concerned, the review must specify the income and expenditure of the fund during the year. The published review must exclude commercially sensitive information and information about an individual's private affairs, where disclosure would or might harm their interests (*subsection (6)*).

Section 145 - Borrowing

986. This section enables Monitor to take out loans in order to exercise its functions to provide financial assistance. This is intended to give Monitor greater flexibility in the ways it manages the flows of money into and out of any funds it holds. The nature of failure is not entirely predictable, therefore the instances of failure could be zero for a considerable time period and then there could, in theory, be several occurring all at a similar time. In an instance like this, the funds may be tied up in investments to make the most of public money. Borrowing may be a suitable alternative to releasing money at short notice from investments (which may involve penalties).
987. *Subsection (2)* provides that Monitor would not be able to borrow beyond a borrowing limit specified by the Secretary of State by order.

Section 146 - Shortfall or excess of available funds, etc.

988. *Subsection (1)* enables the Secretary of State to provide financial assistance to Monitor, if the Secretary of State is satisfied that the financial mechanism established by Monitor to provide funds to special administrators is not generating sufficient funds or the mechanism is not operating effectively. This means that the Secretary of State could top up the financial mechanisms to ensure the continuity of NHS services, where necessary.
989. *Subsections (2) and (3)* provide that the Secretary of State can direct Monitor to transfer funds to the Secretary of State if satisfied that the funds generated by a financial mechanism exceed the level necessary or if the financial mechanism is dormant or has been wound up. This provision is to ensure excess funds do not go unused. The Secretary of State could use the funds for re-investment in the health service.