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FOUNDATION TRUST
CONSTITUTIONS

A REFERENCE
GUIDE

FOUNDATION TRUST CONSTITUTIONS

A REFERENCE GUIDE

This guide is intended to provide governors with information about their role in approving the foundation trust's constitution. We also hope it will be a useful reference for trust secretaries. It outlines the need to be able to understand the content and gives some examples of issues for consideration. It also contains a helpful glossary of common terms.

References to the relevant legislation are included for information and further reading.

Please note that this guidance has been prepared for authorised foundation trusts. While the majority of the content will also be relevant to the preparation of the first constitution for the foundation trust, aspirant foundation trusts are required to use the model core constitution¹ and the model election rules until authorised.

BACKGROUND

The constitution is one of the most important documents within any foundation trust and all foundation trusts are required to have one.² It is a useful point of reference for governors and you should be given a copy as part of your induction and also whenever it is amended. If you misplace your copy, a replacement will be available from your company secretary or you can download a copy from your foundation trust's website or the website of the sector regulator (see glossary for more information). Many questions can be answered by reviewing the constitution. It should be treated like a textbook – available for reference whenever needed but it is not necessary for you to memorise every word.

A foundation trust's constitution is distinct from the overarching NHS Constitution, and the two documents cover different subjects. The NHS Constitution summarises the rights to which patients, public and staff are entitled, includes pledges which the NHS is committed to achieve, and outlines the responsibilities that the public, patients and staff owe to one another to ensure that the NHS operates fairly and effectively. It operates across England (as Scotland, Wales and Northern Ireland are responsible for developing their own health policies) and the NHS Constitution is not affected by a foundation trust's constitution.

By contrast, a foundation trust's constitution contains detailed information about how that foundation trust will operate. It sets out, for example, the foundation trust's membership area, gives information on the various

membership constituencies, and determines the size and composition of the board of directors and the council of governors. It also prescribes the rules by which any election to the council of governors is to be conducted. Having clear rules about how the organisation operates offers some reassurance to patients and service users that the governance of the foundation trust is sound.

All constitutions must comply with statutory requirements (those set out in legislation, such as the National Health Service Act 2006 and the Health and Social Care Act 2012) and therefore some of the content is consistent across all foundation trusts. Legislation also specifies a number of items that must appear within all foundation trust constitutions.

Any amendments to the constitution require the approval of both the board of directors and the council of governors³ so it is vital that governors are satisfied that they understand what it is that they are being asked to approve. Any changes that a foundation trust makes to its constitution take effect as soon as the approval process has been completed,⁴ but an amendment which goes against anything set out in legislation will not have effect.⁵

Foundation trusts are required, both in law and as part of their provider licence, to inform the regulator of the changes but it has no role in determining whether the constitution is legally compliant.^{6,7} Changes to a foundation trust's constitution used to require the regulator's approval⁸ but this is no longer necessary and it is for individual foundation trusts to approve the content.

GLOSSARY

Constitution	The constitution is an organisation's governing document. It is a set of fundamental principles and processes according to which the foundation trust is governed.
Comply or explain	The same approach as for listed companies, the NHS foundation trust code of governance operates on a 'comply or explain' basis. Foundation trusts are required to comply with each of the provisions within the code, or otherwise explain (usually in their annual reports) how they have put alternative arrangements in place that meet or exceed the requirements of the main principles of the code.
Monitor	Until April 2016, Monitor was the name of the regulator for the health and social care sector. After this date, the regulator became known as NHS Improvement - when Monitor joined the NHS Trust Development Authority to form one organisation. After the change some references to Monitor will still be seen, such as within legislation and also when referring to documents previously produced by Monitor until they are updated. This guidance note therefore references Monitor in places, rather than NHS Improvement.
NHS Improvement	The new name for the health and social care regulator which was created when Monitor and the NHS Trust Development Authority joined together.
NHS foundation trust code of governance	A document, based largely on the UK corporate governance code, which is published by the regulator and gives guidance to foundation trusts on effective corporate governance.
Provider licence	A licence issued by the regulator, which everyone who provides NHS health care services is required to hold (unless they are exempt). It contains standard licence conditions which apply to all providers, and the regulator may also impose additional licence conditions as part of its enforcement activities, such as where a foundation trust is found to be in breach of its licence conditions.
Qualitative	Something that is not measurable or quantifiable, for example 'a change to the foundation trust's culture' or 'a deterioration in food quality'.
Quantitative	Based on measurable data or quantities, for example 'a 10 per cent increase' or '500 more patients'.
Quorum	A quorum is the minimum number of members of a group that must be present in order to conduct business. Only full members of the group count towards the quorum; observers and those in attendance are not included. Information on the quorum for each group should be available within the group's standing orders, terms of reference or within the constitution.
Quorate	A meeting is quorate once a quorum is present. If the quorum is expressed as a percentage of the total membership and this results in anything other than a whole number, the result should always be rounded up to the next whole number for the purposes of calculating a quorum.
The regulator	Either Monitor or NHS Improvement, as the context requires.
Risk Assessment Framework	A document produced by the regulator which sets out the manner in which it assesses compliance with the 'continuity of services' and 'foundation trust governance' conditions of the provider licence.
Senior independent director	A role specified within the NHS foundation trust code of governance, it is held by one of the independent non-executive directors. Among other things, their role is to act as a sounding board for the chair and act as an intermediary for the other directors when necessary.

THE NHS FOUNDATION TRUST CODE OF GOVERNANCE

The content of a foundation trust's constitution is not only influenced by legislation. The NHS foundation trust code of governance (the code), published by the regulator, also contains guidance on how foundation trusts should operate. While a full discussion on the code is outside the scope of this guidance note, it is important to note that it operates on a 'comply or explain' basis which means that while foundation trusts are not required to comply strictly with each provision of the code, they are nonetheless required to explain how they achieve the overarching principles contained within it.

The provider licence issued by the regulator requires foundation trusts to 'apply those principles, systems and standards of good corporate governance which reasonably would be regarded as appropriate for a supplier of healthcare services to the NHS'⁹ and to have regard to such guidance on good corporate governance as may be issued by the regulator from time to time.¹⁰ The code therefore forms part of the guidance on good corporate governance that foundation trusts are required to have regard to.

Some examples of how the code influences the content of a foundation trust's constitution include:

- while foundation trusts are free to determine the overall size of the board of directors provided relevant legal requirements are met, the code states that it 'should not be so large as to be unwieldy' (principle B.1.b) and that at least half of the board, excluding the chair, should comprise non-executive directors determined by the board to be independent (provision B.1.2);
- while foundation trusts can determine the overall size of the council of governors once the relevant legal requirements are met, it too should not be 'unwieldy' (provision A.5.2);
- the process for appointing the senior independent director should provide for it to be undertaken by the board of directors, following consultation with the council of governors (provision A.4.1); and
- the code, and the foundation trust's provider licence, requires the directors and governors of the foundation trust to be 'fit and proper persons' in addition to the exclusion criteria contained within legislation¹¹ (provision B.2.2).

APPLYING THE CODE TO YOUR CONSTITUTION

Provision B.7.1. of the code states:

In the case of re-appointment of non-executive directors, the chair should confirm to the governors that following formal performance evaluation, the performance of the individual proposed for re-appointment continues to be effective and to demonstrate commitment to the role. Any term beyond six years (e.g. two three-year terms) for a non-executive director should be subject to particularly rigorous review, and should take into account the need for progressive refreshing of the board. Non-executive directors may, in exceptional circumstances, serve longer than six years (e.g. two three-year terms following authorisation of the NHS foundation trust) but this should be subject to annual re-appointment. Serving more than six years could be relevant to the determination of a non-executive's independence.

What does your constitution say about the terms of office of non-executive directors?

If the constitution allows terms of office for longer than six years, what 'particularly rigorous' review do you undertake?

How does your council consider the progressive refreshing of the board?

The code does not include a similar provision for governors, although the principle is arguably as relevant to governors as it is to non-executive directors. Governors must, however, be subject to re-election every three years and a number of foundation trusts impose a similar maximum term of office for governors.

SIGNIFICANT TRANSACTIONS

A foundation trust's constitution must include provision about significant transactions.¹² A significant transaction requires the approval of the council of governors before the foundation trust is able to enter into it, and it is up to each foundation trust how it wishes to define significant transactions, or indeed whether it wishes to specify any description at all. The only requirement is that the foundation trust's definition of a significant transaction is included in the constitution,¹³ otherwise the constitution must state that it contains no such description.¹⁴

If a constitution does not specify a definition of a significant transaction, this does not remove the requirement for the foundation trust to seek the approval of the council of governors.¹⁵ The foundation trust would need to determine on a case-by-case basis whether a proposed transaction is significant.

This requirement came into force on 1 April 2013,¹⁶ and so constitutions were amended in advance of this date in order to ensure compliance. That said, it is important to remember that the issue of significant transactions is an important one, and should be reviewed on a regular basis. If your foundation trust has already taken the opportunity to define significant transactions, it is good practice to periodically consider whether this definition remains appropriate. If your foundation trust has previously not defined significant transactions, it may be prudent to consider whether this remains appropriate.

Generally speaking, significant transactions usually involve large scale changes. A random sample of foundation trust constitutions has shown that many foundation trusts that have defined significant transactions within their constitutions have elected to use financial thresholds as the basis for their definition.

Many of the definitions are based on the 'thresholds for reporting and detailed review of transactions' in the risk assessment framework; albeit with higher thresholds. For example, a number of foundation trusts have defined a significant transaction as 'equal to or greater than 25 per cent of the trust's assets, income or capital'. In addition to financial thresholds, some foundation trusts have included more qualitative criteria, such as transactions that would involve a diversification from the range of care services currently provided. Alternatively, some foundation trusts have elected not to provide a definition within their constitution.

Do you know what your foundation trust's definition of a significant transaction is?

If it is expressed as a percentage or ratio, have you calculated what this means in financial terms?

When did the council of governors last review the definition?

AMENDING YOUR CONSTITUTION

There are a number of reasons why your foundation trust may be considering making changes to its constitution. For example, it may wish to review its constituencies, make changes to the makeup of the board of directors or the council of governors or to terms of office, or it may simply want to undertake a routine review. Whatever the driver, it is a good idea to involve relevant people at an early stage if you are thinking of amending your constitution. Constitutions are long and often complicated documents and therefore the amendments may take some time for people to digest fully.

An effective way to facilitate a review is to establish a working group comprising governors, directors, and the company secretary. It is often a good idea to ask the company secretary to chair the meetings, as they are independent of both the board and council and have a detailed understanding of the constitution. They are also likely to have lead responsibility for any updates. It is important to ensure that there are a sufficient number of people involved to provide a range of views and to offer constructive challenge where necessary, but not such a large number as to render the meetings ineffective.

Using the tracked changes facility on a document can be useful, although pages of crossed out and underlined text can make a document hard to read, so consider this approach carefully. Given the nature of the meeting, circulation of papers well in advance is essential.

As a governor on the working group, ensure that you understand the rationale behind any proposed changes. Also, take the time to consider whether you feel any other areas of the constitution should be discussed, even if they have not been identified for review. If there are any areas of the constitution that you do not fully understand, use this process as an opportunity to explore the meaning.

APPROVING AN AMENDED CONSTITUTION

Once a final draft of the revised document is available, it must be submitted to both the board of directors and the council of governors for approval. There is no requirement for this to be done in any particular order – the only requirement is that both groups approve the document by majority vote. This means, provided the meetings are quorate, more than half of those present at each meeting must vote to approve the changes. It is not possible for the board or council to delegate responsibility for approval to a working group or committee; any changes must be approved by the board and council.

It is a good idea to provide a covering report detailing the changes that have been made, and explaining why they were needed. This will ordinarily be produced by the company secretary or other lead executive. It is also helpful to provide a summary of the process that has been used to review the document. You should provide a copy of the full document, with the changes shown.

If you have reviewed the document in-house, it may be prudent to ask a solicitor to review your amendments prior to seeking approval.

Why not also request a letter from the solicitor confirming that the document complies with all legal requirements and the NHS foundation trust code of governance? This letter can then be submitted to the board and council as further assurance.

Once the board and council have approved the changes, they take immediate effect. The revised constitution should then be circulated to all directors and governors for information, and a copy sent to the regulator within 28 days of approval (this is the later of the two dates on which the board and council approved the changes). Copies on the foundation trust's website should also be updated.

If either the board or the council (or both) do not approve the changes, they do not take effect and the existing constitution remains in force.

If the board and council have approved any changes to the constitution in relation to the powers or duties of the council of governors, or in respect of the role that the council has as part of the foundation trust, they take immediate effect as described above but at least one member of the council of governors must attend the next members' meeting and formally present the amendment to the meeting.¹⁷ The members present at the meeting are then given an opportunity to vote on whether to approve the change.

If more than half of the members present at the meeting vote to approve the amendment, the amendment continues to have effect. Otherwise it ceases to have effect from the point of the vote, and the foundation trust will need to take such steps as are necessary as a result.¹⁸

The council of governors has a key role in considering and approving the foundation trust's constitution. Advice and guidance is available from your company secretary, who is responsible for corporate governance in your organisation and who will be able to provide advice and support throughout the process of amending the constitution.

It also provides a useful point of reference for governors and it is therefore useful to ensure that you have a copy or know how to access it if necessary.

This guidance document is made available on the basis that no liability is accepted for any errors of fact or opinions it may contain.

Professional advice should be obtained before applying the information to particular circumstances.

References

- 1 Monitor (2013) NHS Foundation Trusts: Model Core Constitution [Online]. Available at: <https://www.gov.uk/government/publications/nhs-foundation-trusts-model-core-constitution>
- 2 sch.7, para.1(1) National Health Service Act 2006
- 3 s.37 National Health Service Act 2006
- 4 s.37(2) National Health Service Act 2006
- 5 s.37(3) National Health Service Act 2006
- 6 s.37(4) National Health Service Act 2006
- 7 Condition FT1(2)(a) of Monitor's Provider Licence
- 8 s.37 National Health Service Act 2006 (before amendment)
- 9 Condition FT4(2) of Monitor's Provider Licence
- 10 Condition FT4(3)(a) of Monitor's Provider Licence
- 11 sch.7, para.8(1) and sch.7, para.16(3) National Health Service Act 2006 and
- 12 s.51A National Health Service Act 2006
- 13 s.51A(2) National Health Service Act 2006
- 14 s.51A(3) National Health Service Act 2006
- 15 s.51A(1) National Health Service Act 2006
- 16 Art.2(2), The Health and Social Care Act 2012 (Commencement No.4, Transitional, Savings and Transitory Provisions) Order 2013
- 17 sch.7, para.27A(4) National Health Service Act 2006
- 18 sch.7, para.27A(5) National Health Service Act 2006

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NHS Providers has 94 per cent of all NHS foundation trusts and aspirant trusts in membership, collectively accounting for £65 billion of annual expenditure and employing more than 928,000 staff.

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