

THE GOVERNANCE OF SIGNIFICANT TRANSACTIONS – HELPING GET THE BIG STUFF RIGHT

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Governors are fundamental to foundation trusts. They bring an explicit connection to the communities we serve, and provide non-executive directors (NEDs) and boards with an essential reference point and check and balance on decisions. Good governance tends to be carried out when governors, testing out decisions taken by boards, are mindful of their constituencies – whether service user, a geographic area, trust staff, or a stakeholder organisation. The scrutiny role of governors is especially important in dealing with “significant transactions” and in holding the trust to account for its financial performance. These aspects of governance can have wide-ranging consequences – for trusts, the services they provide, and the people they serve. It is essential that governors are well-prepared for this part of their role.

By definition, significant transactions are big decisions. This often means the environment for their consideration is particularly febrile, perhaps carrying a heightened sense of urgency and apparent high stakes in the implications of governors supporting or rejecting proposals. The financial repercussions, reputational effect, and impact on those using services, can be particularly great. Boards may feel strongly aligned to the proposals they are seeking support for.

In such circumstances, it is particularly important that governors are able to act confidently, with a clear understanding of their responsibilities and how to carry them out. They need to act as critical friends in ensuring due process has been followed and that the interests of trust members and the public have been appropriately represented. Governors must be prepared to hold NEDs to account, to feel able to question them about the assurances they have sought and gained, and scrutinise and test their responses and assertions, so as to ensure the trust best serves the local community.

Under the 2012 Act more than half of the members of the full council of governors of the trust voting need to approve the trust entering into any significant transaction, as specified in the trust’s constitution. Similarly more than half the members of the full council of governors must approve any application by the trust to merge with or acquire another trust, separate the trust into two or more new foundation trusts or to be dissolved. If the other party to the proposed transaction is also a foundation trust, more than half the governors of that trust must also approve the transaction.

The following key questions may be useful to consider.

1. What does my trust mean by “significant transactions”?

The legislation we operate in allows trusts themselves to define what constitutes a “significant transaction”. It might include, for example, a merger with another trust, moving into a significant new area of activity, or a large-scale service change. It may be defined in financial terms, such as being an action or activity with a financial value above a

particular amount, or above a percentage of the trust's income. And in some cases, it may be that a trust doesn't define what constitutes a significant transaction, but rather defines it on a case-by-case basis.

How your trust defines "significant transactions" should be clear in its constitution, and should be known to governors. If you are unsure on this, check it out and, if necessary, ask for clarification in the way in which the term is used. Check your colleagues' knowledge too, to ensure you have a shared, collective, understanding.

2. What is the process in place for ensuring the appropriate, informed involvement of governors and confirming the representation of the views of their stakeholders?

The role governors should play in scrutinising significant transactions and holding the trust to account for its financial performance should be clearly set out and should be well-understood by all governors. Critically, processes should be in place before any significant transactions or challenging financial performance issues are considered by governors. It is good practice for governors to understand their role in dealing with potentially sensitive, high-risk matters ahead of them actually having to take such decisions. A development session can help governors consider a theoretical significant transaction and how they respond to it, and will enable them to build confidence in carrying out this function without the urgency and pressure of a "real" situation. Such dry runs can help develop a shared understanding of this part of the governors' role.

If you are unsure how your council of governors would deal with a significant transaction, raise this with your colleagues and the trust: you should be prepared for such decisions, and it might be timely to test this out.

3. What does "holding the trust to account for financial performance" mean?

We all know that the NHS is a particularly tough financial environment to be in right now. For example, Monitor (now subsumed into NHS Improvement) reported that 101 of the 153 foundation trusts finished the 2015/16 financial year in deficit – a worsening on the previous year. Service commissioning is ever-more challenging as commissioners seek to maximise every pound they spend and to keep a tight rein on provider trusts' expenditure. And the eye-watering financial targets built in to sustainability and transformation plans (STPs) give a short- to medium-term context that will be tough for some trusts to survive within, let alone thrive and grow, whilst at the same time potentially moving trusts towards radically different new ways of working, with significant changes in the ways services are delivered.

Governors have a responsibility to hold NEDs to account for how they are assured their trust is performing as well as it can financially. In practice, this can bring challenges. Trust finances are complex, working with quantities of public money most of us are unused to contemplating, let alone scrutinising. Over the last few years the national regulators who look at NHS finances have also regularly changed how they evaluate the financial health and risk of foundation trusts. The financial rules that trusts work within can make the way information is presented difficult to read. There is a mass of data available and governors must navigate a careful path through it so they have sufficient financial detail to really understand the decisions taken by boards and the assurances gained by NEDs, without getting drawn into a level of scrutiny that goes beyond their remit, risking them being pulled into detail and missing the bigger picture.

4. Am I avoiding detours, cul-de-sacs and diversions?

The business of boards is, by definition, of interest – if it were not, you wouldn't be a governor! But how governors work with board business is critical to get right.

It is all too easy to get pulled into an area of detail or concern that, whilst noteworthy, is outside your role. At best, this will detract from the proper deliberations and consideration of the council of governors. At worst, this will leave NEDs and their boards potentially unchecked in their actions and without the due scrutiny governors should bring on behalf of their constituencies.

The presentation of complex, large-scale, significant transactions to boards and councils of governors should be different, though consistent. Boards need a level of detail to inform their decision-making that should not be part of the deliberations of governors – by definition, the roles are different, and the information to support the roles should be different too. This does not mean you, as a governor, should not have access to data to bring you sufficient context. But you should take care not to get drawn into a level of detail that is actually outside your remit. The key is to keep focused on your scrutiny function, concentrating on how you test out the assurances NEDs claim they have had.

By focusing on how the board demonstrates it has carried out its role in reaching a decision, rather than getting pulled into the detail of the decision itself, governors will be carrying out their scrutiny roles effectively.

5. Where are the people I represent in this decision?

As a governor you represent a constituency. You should be able to see your constituency reflected in the deliberations that inform board decisions. This may not be explicit in the final recommendation in front of you, but NEDs should be able to explain how constituencies have been considered in reaching that recommendation. This is particularly important when considering finances and significant transactions. Ask yourself whether you can see evidence that the impact of a decision has taken account of those who you represent. If there is a potential negative impact on your constituency, what has been put in place to minimise that impact? If the decision particularly affects your constituency, how will they be involved in, or consulted on, its implementation?

6. Am I sufficiently satisfied with the assurances being reported to me so as to be able to support the proposals?

Governors are responsible for satisfying themselves that the board has been thorough and comprehensive in reaching its decisions and that NEDs have demonstrated that they have scrutinised proposals thoroughly and tested them out as being in the best interests of the trust and those it serves. NEDs should be able – individually and collectively – to explain their assurance of a decision. This applies to all board decisions, but is particularly important for significant transactions as they have far-reaching consequences.

If you can content yourself that this is the case, then you should not stand in the way of the decision, even if you have personal reservations about it.

But if you are not content with the assurances you are given, then you must push back and hold the NEDs – and through them, the board as a whole – to account for decisions.

Governors should be able to trust their NEDs – such trust goes to the heart of a well-functioning governance process. But an important element of that trust is the – rightful – checking of supporting evidence, asking “What is the evidence that shows me how our NEDs have been assured?”, “How have the directors explained and justified their actions?”, “Has due process been followed, and been shown to have been followed, ensuring the views of the public and trust members have been appropriately taken into account?”

NEDs should welcome such questions as part of justifying and demonstrating their assurances. If they are able to, you as a governor can support them. And if they can't, you will have done your job in testing them and seeking better assurance.