ENCLOSURE 13

Birmingham Women's NHS
NHS Foundation Trust

SUBJECT :	Final conditions included in the Monitor Licence
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AUTHOR :	

RECOMMENDATIONS

The Board is invited to:

a. Note the conditions of the Licence that will apply to the Trust from 1st April 2013

Links to Strategic objectives	

Links to BAF risks	

Links to compliance requirements	All NHS providers must have a licence- Health and Social Care Act 2012
	Licences must comply with the requirements of their licence, or risk enforcement proceedings

EXECUTIVE SUMMARY

Under the new arrangements for the provision of NHS services, from the 1st April 2013 each Foundation Trust will be issued with a licence by Monitor, in place of the former Terms of Authorisation. For other providers entering the sector (i.e. private companies, charities or social enterprises wishing to provide NHS-funded services), a licence will be required from April 2014.

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Monitor published its final licence conditions, following approval by the Secretary of State for Health, in February 2013. This paper is to confirm for the Board the requirements that have been put into place, and to note the expected next steps.

Requirements

A detailed list of the requirements imposed under the licence, together with any relevant commentary, is appended to this paper.

Following the consultation process, there have been some changes which have addressed areas of concern that were flagged to the Board previously. These include:

- A relaxation on the asset control for the provision of Commissioner-Requested services, unless the provider is at risk of financial collapse
- There is greater clarity around the process for resolving disagreements about whether a service should be Commissioner-Requested (and therefore mandatory to provide)
- Reasonable provisions have been included regarding compliance structures, and related to a duty to promote integrated services

Monitor have felt themselves obliged, by undertakings given during the progress of the legislation through Parliament, to include detailed additional provisions related to the required governance standards for Foundation Trusts (see especially condition FT4). The Board will wish to consider, as part of its regular processes, the assurances that area available that the Trust is compliant with the standards that have been set out.

Next Steps

As a Foundation Trust, we will automatically be issued with a licence under the legislation on 1st April 2013; the necessary procedural requirements have, we understand, been put into place.

We have raised queries on some aspects of the transition, and in particular what the Board will be asked to certify at the time of the annual planning submission in May; these are being pursued but have not yet been clarified.

There will be a transitional process to the full licence, and the measurement of the Trust's performance under the proposed *Risk Assessment Framework*, running to October 2013, at which time the last of the old system will drop away. During the transition, the Board may wish to consider whether additional or greater assurance is required to enable them to ensure the discharge of their responsibilities under the licence.

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Provisions of the new Monitor licence

General Conditions

Condition number	Provision	Notes
G1	Requirement to provide Monitor information for the purposes of S96(2) of the Act Information must be given when where and how Monitor specify Information must be complete, accurate and not misleading; if a document, that it's a true copy. Waiver if would be covered by legal privilege	This is a general-purpose provision to enable Monitor to obtain information from a licensee, for the discharge of its duties
G2	On direction from Monitor, publish information that relates to health care services provided for the NHS, for the purposes of S96(2)	Monitor can cause us to publish information that it could require us to submit
G3	Payments to be made to Monitor as determined for the functions under S96(2) If no payment date set, pay within 28 days of the demand	This will not be effective for 2013-14, as we understand it
G4	No unfit person to become or remain a Governor without Monitor's approval No unfit person is to be appointed a Director without Monitor's approval Directors' contracts/ arrangements to include that being an unfit person will lead to summary termination; the Licencee is to enforce that provision in a timely way if they discover the Director is unfit If Monitor permission is given, notify Monitor of any	If the categories of unfit person become extended, it may be necessary to amend the Trust Constitution to reflect ths Changes to the contract arrangements will require approval of Nom & Rem Committee (ED's)/ Council (NED's) Enforcement for NED's will (as per Act) require a three-quarters majority of Council

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	changes in role for that Director/ Governor Unfit if: • Undischarged bankrupt or sequestration • Undischarged arrangement, composition or Trust Deed for creditors • Convicted in British Isles of offence and sentenced to at least three months (suspended or otherwise) without option of fine • Subject to an unexpired order under the Company Directors' Disqualification Act 1986	The first three conditions are automatic disqualifications for FT Directors/ Governors in any event (NHS Act 2006, Sch. 7) This condition is already a disqualification under the Trust Constitution
G5	Have regard to Monitor's guidance issued for the purposes of S96(2) If decide not to follow guidance under this or any other condition of licence, notify Monitor of the reasons for the decision.	We have asked for clarity as to whether any current guidance will be included under this provision
G6	Take all reasonable steps to avoid non-compliance with: a. Licence b. Requirements under the NHS Acts c. Requirement to have regard to NHS Constitution when providing NHS services As part of this, requirements to: • Establish and implement systems to identify risks and guard against their occurrence • Regularly review whether systems are implemented and effective Within 2 months of year-end (May for FT's) submit to Monitor a certificate as to whether the Board, following	We believe that we have compliance with these requirements, which could form part of future assurance programmes This will be covered largely by the BAF This is covered by the Internal Audit programme We have asked for confirmation as to whether this applies for 2013

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	review, are satisfied with the systems in place under this condition The certificate is to be published within one month of submission, in a way to bring it to the attention of people who can reasonably be expected to be interested in it.	It is not currently clear how to identify who can be reasonably expected to be interested in the certificate; this will also inter-relate to the Annual Governance Statement.
G7	Maintain necessary CQC registrations at all times Notify Monitor promptly of any cancellation of registration, or application to have registration cancelled.	This inter-relates the licence to CQC Registration.
G8	Set transparent selection and eligibility criteria for licensed services Apply the criteria in a transparent way to those choosing to being treated by the licensee Publish the criteria in a way to make them readily accessible to those who are likely to have an interest in them Eligibility and selection criteria includes how services will be provided if a person is selected to receive them	Steps are being taken to ensure that the selection and eligibility criteria operated by the Trust are appropriate and published in a relevant way.
G9	Initial Commissioner-Requested services to be anything required in authorisation, or provided by an FT under an NHS contract The initial CRS designations will be in effect for three years (to March 2016), unless agreed to exclude under the Licence There is now a refusal and appeal to Monitor procedure where Commissioners seek to designate a service as CRS	These services cannot be ‘appealed’ during the initial 3-year period set out in the Licence

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	28 days notice of the expiry of a CRS contract, which has not had renewal agreed, to be given to Monitor If contract for CRS expires without agreed renewal, then (save as agreed by Commissioner) the Licensee must continue to provide it as if the contract continued until Monitor orders otherwise A statement setting out the description and quantity of CRS provided is to be available to any person free of charge Within 28 days of any changes to the description and quantity of CRS the Licensee is required to provide, a full list of all descriptions and quantities of CRS is to be provided to Monitor	We are seeking confirmation that the Commissioning Bd is placing a corresponding obligation on CCG's to pay- otherwise there may be risk that they can avoid as the contract relationship has ended This will be put into place via the web-site This will affect not only the contracting round, but also the changes that arise during the year in discussions with Commissioners (for example, Genetics over-referrals)

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Pricing conditions

Condition number	Provision	Notes
P1	When required by Monitor- • Obtain, record and maintain sufficient information about costs of providing NHS services • Establish, maintain and apply systems to provide this information From publication by Monitor of approved Currencies, record information on costs of providing NHS services in those Currencies, using approved Monitor methodology; and require this of sub-contractors, who must produce the information to Monitor.	This relates to recording information for Monitor's responsibilities in setting the tariff.
P2	Obligation to provide Monitor with such information, documents and reports as it may require for the purposes of Chapter 4, Part 3 of the 2012 Act (related to setting the tariff) Reports, documents and information must be accurate, complete and not misleading; and provided to Monitor's instructions Production is waived if they are subject to legal professional privilege	
P3	If directed by Monitor, the Licensee is to produce and submit an assurance report regarding the cost information provided Assurance reports to be prepared by an auditor, and certify regarding: • Whether the cost records are maintained in	Monitor have indicated that this will not be sought unless the benefits are believed to outweigh the costs. It seems likely that Monitor would only want an assurance report where they considered a providers' systems were weak

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	accordance with the condition • Whether the costs have been analysed in accordance with the condition (i.e. as Approved Currencies) • Whether the submissions provide a true and fair assessment of the information	
P4	Providers must comply with the National Tariff unless authorised in writing by Monitor	This will apply from 2014-15 (expected) There is a mirror provision for Commissioners- S115, 2012 Act
P5	Licensees must have constructive engagement with Commissioners on local modifications to tariff.	

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Choice and Competition conditions

Condition number	Provision	Notes
C1	For every patient of the Licensee, where they have a choice of provider under national or local arrangements, the Licencee must inform them of that choice and where further information is available Information provided by the Licensee on choice of provider shall not be misleading; shall not favour one provider over another; and must be presented, as far as possible, to assist in making well-informed choices between providers No Licensee may, in promoting its NHS activities, provide or offer gifts, benefits in kind, or pecuniary or other inducements to clinicians, health professionals, Commissioners, administrations or staff as inducement to refer.	Arrangements are being made to ensure that this condition is complied with. We believe that our information provision meets the 'fair and balanced' requirement. This is probably illegal under the Bribery Act 2010 in any event
C2	No Licensee shall enter into agreements or conduct that does or is likely to prevent, restrict or distort competition for NHS-funded services, so far as it is against the interest of those using those services	This imposes a duty not to act in an anti-competitive manner. There is an exception around anti-competitive practice being in the interests of users of the health service, but the extent of that exception is currently unclear.

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Integrated Care conditions

Condition number	Provision	Notes
IC1	Licensees must not: • Do anything reasonably regarded as against NHS user interests by being detrimental to the enabling of integrated NHS services to achieve the objectives • Do anything reasonable regarded as against NHS user interests by being detrimental to the enabling of integrated health and social care services to achieve the objectives • Do anything reasonably regarded as against NHS user interests by being detrimental to enabling it to co-operate with other providers to achieve the objectives The objectives are any one or more of: • Improving the quality (including outcomes) or efficiency of NHS provision • Reducing inequalities in the ability of people to access NHS services • Reducing inequalities for people using NHS services in terms of outcomes Licensees to have regard to Monitor's guidance as to behaviours falling within the prohibition.	This condition sets out the requirements for integrated care for licensed organisations It is a negative probation- restrain from actions, rather than positively take actions to better integrate care- but there may be other drivers that require integration (for example, the Standard Contract might require this in the future). It seems likely that the relevant judgement of what is "reasonably regarded" will be made by Monitor. Guidance is awaited from Monitor on the implementation of this condition.

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Continuity of Service conditions

Condition number	Provision	Notes
CoS1	Save as provided, Licensee must not discontinue or materially alter the specification for CRS If Monitor issues a direction to continue providing CRS after the end of the contract period, the Licensee must comply for the specified period Licensee must not materially alter specification or means of provision for CRS without agreement of all Commissioners for whom it's CRS; or Monitor's consent in some circumstances Notice of all changes to specification or means of provision for CRS to be given to Monitor within 28 days; this includes any changes to the contract specification as previously in place	For the first three years, all previously Mandatory services will be CRS; so almost all of the Trust's services will be subject to these requirements. We understand (but are seeking to clarify) that this will require individual agreement from all relevant Commissioners, not just the Co-ordinating Commissioner on their behalf.
CoS2	Licensee must maintain an Asset Register listing all assets used for the provision of CRS; to be established, maintained and updated in a manner reasonably regarded as adequate and professional Restrictions on the use of the assets needed for CRS will apply if Monitor has given notice of concerns about the ability of the Licensee to continue as a going concern	The necessary Register will be established by the Finance Dept, in conjunction with the asset register maintained for accounting purposes
CoS3	At all times, Licensee will adopt and apply standards of: • Corporate governance • Financial management	These standards will be applied to all Licence-holders. Condition FT4 sets out much more detailed requirements for Foundation Trusts.

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	as are reasonably regarded as suitable for a provider of CRS, and give reasonable safeguards against ceasing to be a going concern Licensee to have regard to: • Monitor guidance on systems and standards for corporate governance and financial management • The rating under the Monitor methodology • The desirability of maintaining the minimum rating regarded as acceptable by Monitor	These will be as set out in the *Risk Assessment Framework*
CoS4	Where relevant, Licensee to obtain undertakings from its ultimate controller that it will not undermine the provisions of the licence	This will not apply to Foundation Trusts, their Directors or Governors
CoS5	Licensee to pay any 'risk pool' levy as required; if no date stated, within 28 days of the demand.	This supports the payment of funds into the 'risk pool' that Monitor will use to continue required CRS at a Trust placed into special administration.
CoS6	If Monitor gives notice of concern about the ability of the Licensee to continue as a going concern, the Licensee must: • Provide information as Monitor direct to Commissioners and others • Permit any person Monitor appoints to attend their premises to inspect • Co-operate with any persons Monitor appoints to assist in the management of the Licensee's affairs, business and property	This is Monitor's authority to engage in the providers affairs short of special administration being invoked (*cf* the current provisions for 'hit squads' within the *Compliance Framework*)
CoS7	At all times, the Licensee must act in a way calculated to ensure that it has the required resources (financial,	This essentially prioritises CRS services over any other services provided by the Licensee.

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	management, physical and human) to deliver CRS, and undertake no commitment that would create a material risk to that provision Within two months of year-end (so in May each year), the Board must make a certificate to Monitor on their reasonable expectations to be able to provide those resources for the following twelve months- either that • they are confident • they expect to but would draw attention to risks • are not confident. The certificate to be supported by a statement on the main factors taken into account when agreeing the certificate. Monitor to be advised immediately if the Directors become aware of any circumstances during the year which would lead them not to reasonably expect to maintain that certificate Certificate to be published in such a manner as to be reasonably available to those with an interest in it.	We are clarifying whether this certification will required in May 2013 Publication on web-site; considering whether other methods of publication required for compliance

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Foundation Trust conditions

Condition number	Provision	Notes
FT1	FT Licensee must ensure Monitor has available hard and electronic copies of: • Trust Constitution • Most recent annual accounts and auditors report • Most recent annual report Changes to Constitution to be filed within 28 days of adoption; Annual Report and Accounts to be filed within 28 days of publication Hard and electronic copies of all documents required under s39 of the 2006 Act (Registrar function for FTs) to be provided to Monitor within 28 days of receipt Submissions to be accompanied by short statement describing the document, specifying the electronic format, and stating submission for the purposes of s39	There are not likely to be significant submissions under s39 other than the listed documents
FT2	FT Licensees to pay to Monitor fees regarding the provision of the Registrar service	Monitor would consult separately on whether to introduce these fees
FT3	FT Licensees to comply with any request for information or advice under the Act to support the work of the Governor's Referral Panel	The Panel is established under the 2012 Act to deal with formal references from Councils of Governors regarding apparent failures by a Board to follow the Act or the Trust Constitution
FT4	FT Licensees must apply principles, systems and standards of good corporate governance as would reasonably be regarded as appropriate for NHS-funded heathcare Licensee to have regard to Monitor's guidance on good	We are seeking clarification as to whether the *Code of Governance for*

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	corporate governance Licensee to establish and implement: • Effective Board and Committee structures • Clear responsibilities for Board, Committees reporting to Board, and staff reporting to Board and Board Committees • Clear reporting lines and accountabilities throughout the organisation Systems and process to be established and implemented for: • Compliance with the duty to operate economically, efficiently and effectively • Timely and effective oversight and scrutiny by the Board of the FT's operations • Ensuring compliance with binding healthcare standards, including those issued by Sec of State, CQC, NCB and statutory regulators of professions • Effective financial decision-making, management and control • Obtaining and disseminating accurate, comprehensive, timely and up to date information for Board and Committee decision-making • Identifying and managing risks to compliance with the License conditions • Generation and monitoring of delivery against business plans, and receiving internal and (where appropriate) external assurance on them • Ensuring compliance with all applicable legal requirements	*Foundation Trusts* falls under this provision These items could be assured through the regular Internal Audit reviews of the Trust's governance provisions This forms part of the external audit process It's not clear what binding authority the NCB or Secretary of State has over a Foundation Trust

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	Systems and processes include those to ensure: • Sufficient Board capacity to provide organisational leadership on quality of care • Board planning and decision-making takes appropriate and timely account of quality of care issues • Collection of accurate, timely, comprehensive and up to date information on quality of care; its reception and taking into account by the Board • The Trust, including the Board, actively engages on quality of care with patients, staff and other relevant stakeholders; takes into account appropriate views and information from these sources • Clear accountability for quality of care throughout the FT, including escalating and resolving quality issues; and process for escalation to the Board for consideration where appropriate Existence and effective operation of systems to ensure that personnel on the Board, reporting to the Board and within the rest of the FT are sufficient in number and appropriately qualified to ensure compliance with Licence conditions Within three months of year-end (June annually), submit certificate to Monitor: • Confirming compliance for the 12 months ended • Confirming anticipated compliance for the financial year, any risks to compliance and actions to be taken to manage them If required by Monitor, certificate to be accompanied by	These are the responsibility of the Nomination & Remuneration Committee (Execs) and the Council (NED's) The Board may wish to consider how it is assured about compliance with this condition The Board may wish to consider the assurances available that appropriate concerns would be escalated to the Board through an 'automatic' process Whilst the Board is asked to certify regarding Board personnel, it is not responsible for those appointments; they fall to the NED's (for Execs) and Council (for NED's) We are seeking to confirm whether this certificate will be required in 2013

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	Auditors' statement confirming all actions from the last statement were undertaken, or identifying those that were not undertaken.	