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Protecting patients' interests - ensuring continuity of NHS services

*A consultation on proposals for a health special
administration procedure for companies*

A consultation on proposals for a health special administration procedure for companies.

DH INFORMATION READER BOX		
Policy	Clinical	Estates
HR / Workforce	Commissioner Development	IM & T
Management	Provider Development	Finance
Planning / Performance	Improvement and Efficiency	Social Care / Partnership Working
Document Purpose	Policy	
Gateway Reference	18285	
Title	Protecting patients' interests - ensuring continuity of NHS services. Consultation on proposals for a health special administration regime for companies.	
Author	DH / Policy & Outcomes / Sector Regulation	
Publication Date	1st November 2012	
Target Audience	NHS Trust CEs, SHA Cluster CEs, Care Trust CEs, Foundation Trust CEs , Medical Directors, Directors of Nursing, NHS Trust Board Chairs, Directors of Finance, Allied Health Professionals, GPs, Communications Leads, Emergency Care Leads, Trade Unions, CCGs	
Circulation List		
Description	This consultation invites views on the proposed health special administration procedure, design of the regime and technical details. The HSA procedure protects patients' interests by ensuring that if a company fails, continuity of services is based on decisions made by commissioners and enables Monitor to support commissioners in ensuring service continuity.	
Cross Ref	Sector regulation: update on plans for consultation and implementation	
Superseded Docs	N/A	
Action Required	N/A	
Timing	Please respond by 4 January 2012	
Contact Details	Kate Wignall Sector Regulation Richmond House 79 Whitehall SW1A 2NS 0207 210 6858	
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First published November 2012

Published to DH website, in electronic PDF format only.

www.dh.gov.uk/publications

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Executive summary

1. This document seeks comments on draft regulations which set out details of the 'health special administration' (HSA) procedure designed to secure the continuity of NHS services provided by companies, including social enterprises, to protect the interests of patients.
2. NHS services have always been provided by a diverse range of organisations, in particular the previous Government established social enterprises. However until now, there have been no special legal arrangements in place to secure the continuity of NHS services provided by social enterprises and other companies.
3. The draft regulations set out further details of the HSA procedure introduced by the Health and Social Care Act 2012 (the 2012 Act). The procedure provides Monitor with an additional regulatory tool to secure the continuity of NHS services if a company fails and where prior interventions, operating through Monitor's licensing regime, have either been unsuccessful or are not considered appropriate to best protect the interests of patients.
4. The draft regulations build on Great Britain's existing legislative framework and are based on the process of administration, with appropriate changes to tailor the procedure to the requirements of the health care sector. Some of the main features of the regime are:
 - an overriding objective to secure the continuity of NHS services to protect the interests of patients,
 - key roles for commissioners and Monitor,
 - a public consultation process where implementing service continuity proposals would involve a significant variation in the provision of NHS services, and
 - financial assistance mechanisms to fund service continuity.
5. A copy of the draft regulations is included at **Annex C** and **Annex D** shows how the regulations would apply.
6. We would welcome your views on both the overall design of the regime and the technical details.

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Key areas of consultation

7. The draft regulations are technical in nature and this paper therefore provides a general overview and explores certain technical details.

8. In particular, the consultation considers the:

- role of commissioners in determining which NHS services should be secured;
- process for agreeing solutions to secure continuity of services, including public consultation where plans would involve significant service change;
- creation by Monitor of a register of providers which may be subject to HSA;
- restriction of certain rights of creditors;
- grounds for starting HSA;
- appropriateness of indemnity provisions for health special administrators;
- general process of HSA, including the role of Monitor;
- arrangements for transferring services, property, employees and liabilities between organisations; and
- exit routes from HSA.

Timing

9. The regulations must be approved by both Houses of Parliament. Further secondary legislation (rules) will then be required to make the regime work in practice. This approach reflects the underlying legislative framework.

10. The HSA regulations are expected to be laid in April 2013. The rules will then be made to bring the HSA regime into effect from April 2014.

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Impact Assessment ('IA')

An impact assessment is published alongside this consultation paper.

Equality Impact

The draft regulations set out a procedure designed to ensure the continuity of certain NHS services, in line with commissioners' requirements, if a company fails. It is not expected that these regulations would have any direct impact on equality for people with protected characteristics under the Equalities Act 2010, namely age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, or sexual orientation.

Question (1): Could the proposals have any perceived or potential impact on equality including people sharing protected characteristics under the Equality Act 2010?

Glossary of terms and abbreviations

Administration	Insolvency procedure that may be used to rescue a company as a going concern or produce a better result than an immediate winding up.
Administrator	Insolvency practitioner appointed by the court or directly by a floating charge-holder, a company or its directors.
Administrative receiver	A receiver or manager of the whole (or substantially the whole) of a company's property appointed by a floating charge holder.
Compulsory liquidation	Insolvency procedure commenced by court order (winding-up order) usually after the filing of a petition by a creditor.
Creditor	A person owed money.
Company voluntary arrangement	Procedure where a company comes to a binding agreement with its creditors for the settlement of debts.
Director	A person conducting the affairs of a company, which includes shadow directors (persons not formally appointed as a director).
Floating charge-holder	Person holding security in the form of a floating charge; amounts owed to a floating charge-holder are payable before the claims of ordinary unsecured creditors, but rank below the claims of any preferential creditors.
Foundation Trust	Public benefit corporation providing NHS services.
Health special administration (HSA)	A modified form of administration for companies providing NHS services which are subject to continuity licensing arrangements.
Health special administration order	An order made by the court appointing a health special administrator.

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Health special administrator	An insolvency practitioner appointed to take control of the affairs, business and property of a failed company who is obliged to secure the continuity of NHS services in line with commissioners' requirements.
Insolvency Act 1986 (IA86)	Primary legislation governing the insolvency of companies and individuals in England and Wales. Some procedures, such as administration, also apply in Scotland.
Insolvency practitioner	A person (generally an accountant or solicitor) qualified and authorised to act as an insolvency office-holder, for example acting as an administrator or liquidator.
Insolvency Rules 1986	Secondary legislation dealing largely with procedural matters that makes the insolvency procedures set out in the IA86 work in practice.
Liquidation (winding up)	Process in which assets are realised (e.g. sold) and distributed to creditors. A business is usually closed down when a company goes into liquidation. Winding up may be commenced by court order or voluntarily by a company's shareholders.
Liquidator	A person, either an official receiver or insolvency practitioner, appointed to take control of a failed company and realise assets for the benefit of creditors.
Preferential creditor	A class of creditor, specified in law, which is paid before the claims of any floating charge-holders and ordinary unsecured creditors. The main categories of preferential debts are certain amounts due to employees and contributions to occupational pension schemes.
Special administration regimes	Alternative insolvency arrangements to the corporate insolvency procedures set out in the IA86. Special administration regimes are based on the process of administration, but with modifications aimed to secure the continuity of essential public services if a supplier fails.

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Secured creditor	A creditor holding security, for example a fixed or floating charge, over assets in respect of monies owed.
Statement of affairs	A sworn document submitted by a company officer, usually a director, which provides information about a failed company including details of the company's assets and debts.
Unsecured creditor	Creditors who do not hold security in respect of money owed to them. Claims may either be preferential or ordinary.
Voluntary liquidation	Winding up commenced by a resolution of a company's members - can either be a members' voluntary winding up (where the company is able to pay its debts in full) or a creditors' voluntary winding up (where the company is insolvent).

Background

Introduction

1. Part 3 of the 2012 Act sets out the framework for the regulation of health care services and further details, including the secondary legislation required to implement the Act, are set out in the following publications:

- *Protecting and Promoting Patients' Interests: the role of Sector Regulation*¹;
- *Sector Regulation: a short guide to the Health and Social Care Bill*²; and
- *Sector Regulation: update on plans for consultation and implementation*³.

Securing continuity of services

2. As set out in the above publications, the 2012 Act establishes an improved legal framework of safeguards to protect patients' interests in the case of a provider of NHS services becoming financially and/or clinically unsustainable. The new framework builds on the current 'unsustainable provider' regime for foundation trusts ('trust special administration') and also, for the first time, extends safeguards to a broader range of providers by the introduction of a new HSA regime for companies providing NHS services.

3. The continuity of services framework will:

- protect patients' interests by ensuring that patients are always able to access the services they need and can be confident that those services meet the Care Quality Commission's essential safety and quality requirements and relevant clinical guidelines;
- ensure that health professionals take the lead in securing continued access to essential NHS services;
- ensure that proactive action is taken - Monitor will support commissioners to intervene on the basis of an ongoing assessment of risk, where providers are

¹ Department of Health (December 2011) *Protecting and Promoting Patients' Interests: the role of Sector Regulation*. www.dh.gov.uk/health/2011/12/role-of-sector-regulation

² Department of Health (February 2012) *Sector Regulation: a short guide to the Health and Social Care Bill*. www.dh.gov.uk/health/2012/02/sector-regulation/

³ Department of Health (July 2012) *Sector Regulation: update on plans for consultation and implementation*. <http://www.dh.gov.uk/health/2012/07/sector-regulation-update/>

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heading towards unsustainability, in order to secure continuity of services. Clinical commissioning groups and the NHS Commissioning Board should review the sustainability of the services they commission and take proactive steps to address underperformance on quality or efficiency;

- provide an evolutionary approach which maintains and significantly improves the current 'unsustainable provider' regime for foundation trusts, while extending equivalent protection to NHS services provided by a company through the HSA regime;
- support decision-making based on the clinical case for change, ensuring that proposed solutions to unsustainable services are driven by the clinical case for change, agreed by clinical commissioning groups and developed through consultation with the broader local community; and
- ensure that decisions are taken locally and that democratic accountability is maintained by local authorities having scrutiny of all service changes.

4. The 2012 Act requires Monitor to maintain an assessment of the risk of providers becoming unsustainable and to proactively intervene if the risk gets too high. It gives Monitor various options for action which can be taken, such as:

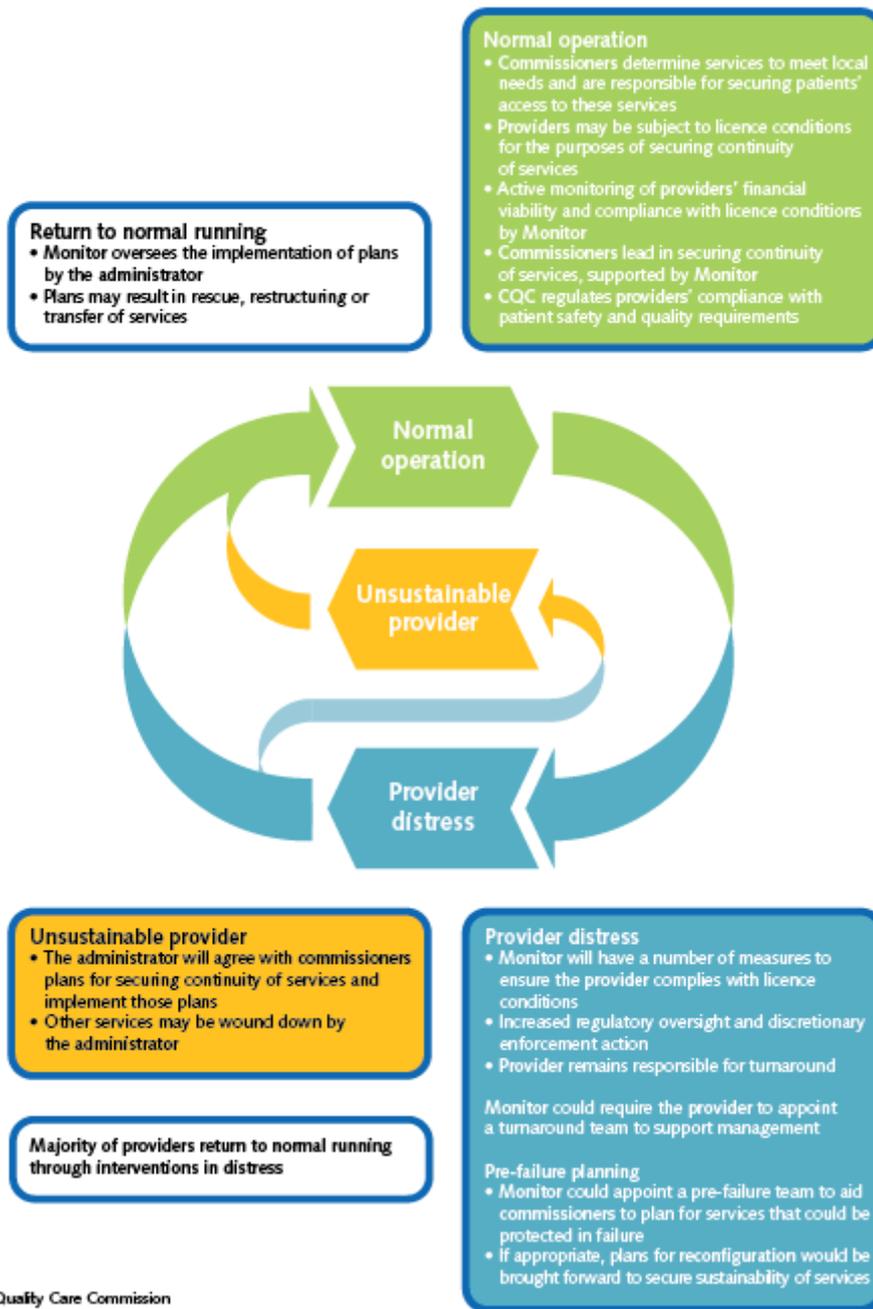
- intervening proactively to support recovery through additional licence conditions where a provider gets into difficulty;
- modifying the prices a provider is paid if they can prove that they are not being paid enough to cover the cost of providing the service, despite doing so efficiently; or
- requiring cooperation with commissioners and any contingency planning team appointed by Monitor.

5. If necessary, Monitor could appoint an administrator to take control of an unsustainable foundation trust's affairs, or in the case of an insolvent company seek the appointment of a health special administrator. Monitor will also have power to levy providers (and potentially also commissioners) to create a fund to pay the costs associated with ensuring service continuity in special administration.

6. The continuity of services framework is summarised in Figure 1 below.

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Figure 1 – NHS Continuity of Services Regime



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Resolving foundation trust failure

7. Foundation trusts are ‘public benefit corporations’⁴ and continuity arrangements to protect patients’ interests are set out in the trust special administration regime⁵, which is updated and improved by Part 4 of the 2012 Act. Trust special administration is not based on insolvency law and some of the key features of that regime are:

- The regime commences by statutory instrument. Only Monitor may take steps to appoint a trust special administrator (TSA) following consultation with Secretary of State, the foundation trust and relevant commissioners of services.
- A suitably experienced person may be appointed as the TSA and there are no requirements for that person to be a qualified insolvency practitioner. The TSA takes control of the foundation trust and is obliged to secure the continued provision of NHS services in line with commissioners’ requirements.
- The TSA agrees proposals with commissioners and recommends actions to Monitor.
- Those recommendations are published and are subject to a 6-week public consultation process.
- A final report, informed by consultation and agreed with commissioners, is submitted to Monitor.
- Monitor considers the clinical and financial case for any change, decides what action to take in relation to service provision and reports to the Secretary of State.
- The Secretary of State would only be able to intervene where there was a failure:
 - in following due process;
 - to secured continued access to services;
 - to secure services meeting appropriate safety and quality standards; or
 - to provide good value for money.

⁴ Section 30 of, and Schedule 7 to, the National Health Service Act 2006.

⁵ Chapter 5A of Part 2 of the National Health Service Act 2006 as amended by the Health Act 2009 and the 2012 Act.

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Companies providing NHS services

8. There are currently no specific legal arrangements in place to secure the continuity of NHS services in the event of the failure of a company.
9. Company failure is governed by the Insolvency Act 1986 (IA86) which sets out a range of procedures aimed at either facilitating a company rescue (for example, company voluntary arrangements and administration) or allowing for the orderly winding up of the affairs of a failed company (for example, voluntary and compulsory liquidation).
10. Those procedures focus on the interests of creditors and HSA provides an alternative which could be used where a company providing NHS-funded services, which are subject to certain licensing continuity arrangements, fails. HSA could apply to companies within the definition of a 'relevant provider'⁶ and this would include public limited companies, private limited companies, companies limited by guarantee, community interest companies and unregistered companies (for example, overseas companies).
11. The over-arching objective of HSA is to ensure the continuity of certain NHS services in line with commissioners' requirements. This would be achieved by rescuing the provider as a going concern and/or the transfer of services as a going concern to another provider. Transfers would, for example, be permitted in cases where a rescue was not feasible or would not produce the best outcome for creditors, or where the transfer of some services would facilitate the rescue of the company's remaining business.
12. A transfer may in effect involve a sale of assets to one or more alternative providers. The terms of a transfer scheme would be agreed on a case-by-case basis between the health special administrator (acting for the failed company) and the new provider. A transfer scheme could include arrangements for the transfer of staff, property, rights and liabilities. As a safeguard to ensure service continuity, a transfer scheme would need to be approved by Monitor.
13. HSA is designed to mirror the flexibility in 'ordinary' administration proceedings. There will not be a fixed outcome, other than achieving the service continuity objective, rather there will be flexibility to ensure appropriate outcomes on a case-by-case basis. HSA would give protection to the company and its property, allowing the health special administrator time to agree and implement an appropriate solution. Once the continuity objective has been achieved, HSA could be brought to an end in a number of different ways.

⁶ Section 128(9) of the 2012 Act.

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14. Where a company rescue is achieved, the proceedings would end by court order and the health special administrator would be removed; the company would exit HSA as a going concern, although perhaps operating under a different commercial or business model, and the normal rights of directors, creditors and members would resume. A rescue could be achieved by a company voluntary arrangement agreed with the company's creditors and in those cases the rights of creditors would be subject to the terms of that arrangement.
15. In cases where service continuity is achieved by transferring services, the company could be moved to ordinary insolvency proceedings. The company could, for example, be moved to liquidation to distribute assets to creditors, or moved to administration where that would produce a better outcome for creditors than an immediate winding up of remaining assets. In the unlikely event that the company's business and property were fully wound up in HSA and all proceeds had been paid to creditors, the company could be moved to dissolution to end its legal existence.
16. To protect the interests of creditors, the Act provides for the establishment of financial mechanisms to fund service continuity.

Financing the continuity of NHS services

17. Monitor must establish financial assistance mechanisms to fund the costs associated with ensuring service continuity if a provider enters special administration. The framework for these financial arrangements is set out in Chapter 6 of Part 3 of the 2012 Act⁷ and Monitor will be consulting on further details about this in due course.
18. Monitor may levy providers (and potentially also commissioners) to create a fund to pay the costs associated with ensuring service continuity in special administration. Funding may be in the form of grants or loans, or the establishment of appropriate insurance facilities, for the purposes of securing the continuity of services according to commissioners' requirements and to secure a viable provider in the long run.
19. It would be unfair for creditors to bear the costs associated with securing continuity of NHS services and the Department expects that, as a point of principle, the funding mechanisms should operate in a way that generally makes creditors no worse off (and no better off) than in an 'ordinary' administration.

⁷ Sections 134 to 146 of the 2012 Act.

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Relevant Monitor consultations

20. Monitor has published consultations on:

- proposals for the NHS provider licence⁸, which sets out details on how the licence will operate in terms of securing continuity of services; and
- guidance for commissioners on identifying services that would be subject to Monitor's continuity of services regime⁹.

Legislative framework for companies

Introduction

21. Sections 128 to 133 of the 2012 Act provide for a HSA procedure that could be applied in the event of the failure of a company that is providing NHS services which are subject to certain licensing continuity requirements. The detail of the regime is to be set out in regulations¹⁰ but some important features are already set out in the 2012 Act.

22. HSA would provide an alternative to standard corporate insolvency procedures and would protect the interests of patients by prioritising the ongoing provision of NHS services that commissioners determine must be secured. The proposed HSA procedure draws on:

- the process of administration set out in Schedule B1 to the IA86;
- existing special administration regimes; and
- the updated trust special administration regime for foundation trusts.

23. It may not be necessary to use HSA in every case. Through licensing arrangements, a range of pre-failure interventions will be available to Monitor and standard corporate insolvency procedures will still remain an option. HSA would be a last resort to secure the continuity of NHS services to protect the interests of patients where a company becomes insolvent.

Meaning and objective of HSA¹¹

24. The 2012 Act sets out some key features of the HSA regime:

⁸ <http://www.monitor-nhsft.gov.uk/home/news-events-and-publications/our-publications/consultations/consultations-and-engagement-monito>

⁹ <http://www.monitor-nhsft.gov.uk/home/news-events-and-publications/our-publications/consultations/consultations-and-engagement-monito-1>

¹⁰ Sections 130 – 132 of the 2012 Act.

¹¹ Sections 128 and 129 of the 2012 Act.

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- HSA could only be used to resolve the failure of a provider which falls within the definition of a 'relevant provider'¹². This means a company providing NHS services which are subject to Monitor's licensing continuity arrangements.
- HSA could only start by court order and only Monitor may apply to the court for the making of an HSA order¹³. The reason for this restriction is primarily that HSA would be a significant intervention that would be likely to require special funding from Monitor under the financial assistance arrangements to be established under the 2012 Act.
- Where the court makes an HSA order, an insolvency practitioner would be appointed as the health special administrator and would take control of the company's affairs, business and its property.
- The objective of HSA would be to secure continuity of NHS services in line with commissioners' requirements¹⁴.
- Service continuity would be secured by rescuing the company as a going concern and/or transferring service provision to alternative providers. Trying to rescue the company would take priority and transfers would only be allowed in certain circumstances, for example where a rescue was not possible or where transfers would produce a better outcome.
- To keep down the costs of the proceedings, the health special administrator would be required to act quickly and efficiently to achieve the objective of HSA.
- As a safeguard to those with a financial interest in the company, the health special administrator would also need to act in a way that protects the interests of the company's creditors and members although this would be subject to achieving the continuity of services objective.

Draft HSA regulations

25. The regulations are technical in nature and apply many provisions of existing insolvency law, with changes where considered necessary.

¹² Section 128(9) of the 2012 Act.

¹³ Although the draft regulations provide that HSA could also start where the court made an HSA order on an application by the Secretary of State (for Business, Innovation and Skills) for the winding up of a company in the public interest, but in general it is expected that HSA would start following an application by Monitor.

¹⁴ Section 129(1) of the 2012 Act.

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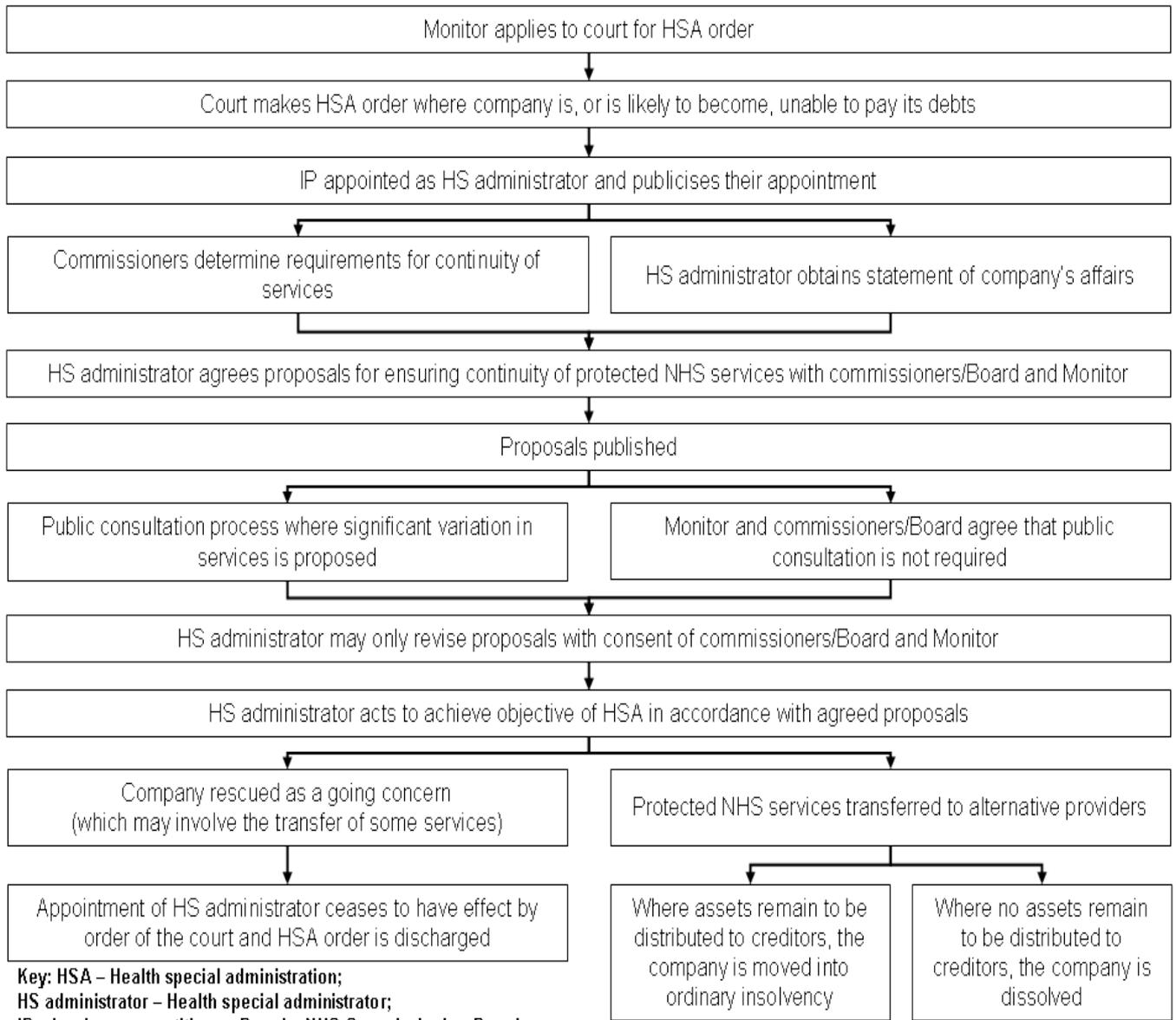
26. In particular, the regulations apply the process of administration set out in Schedule B1 to the IA86, with appropriate changes where required. Additional provisions, new and specific to the health sector, and consistent with the overall aim of protecting the interests of patients, are also included.
27. A copy of the draft regulations is provided at **Annex C** and **Annex D** shows how the draft regulations apply and alter the process of administration¹⁵ for the purposes of HSA.
28. Further secondary legislation ('rules') will be required to add detail and to make the regime work in practice. This general approach is consistent with the underlying insolvency legislation and the rules for England will be subject to consultation and agreement with the Insolvency Rules Committee¹⁶. Separate rules will be required for companies registered in Scotland, that are providing NHS services in England which are subject to licensing continuity arrangements, to reflect differences between the law in England and Scotland.
29. The proposed HSA procedure is summarised in Figure 2 below, and the rest of this document considers the detail of the draft regulations.

¹⁵ Schedule B1 to the IA86.

¹⁶ A body of insolvency experts appointed under section 413 of the IA86 for the purpose of being consulted by the Lord Chancellor before making any rules under section 411 of that Act.

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Figure 2: Illustrative HSA process



Draft HSA regulations

Introduction

30. The regulations are divided into 3 parts as summarised below.

Table 1 – Structure of the draft HSA regulations

Part	Regulations	Summary
Main body - regulations 1 to 13	1: Citation and commencement	Introductory provisions
	2: Interpretation etc	Defines terms used in the regulations
	3: Criteria for the purposes of section 129(1) of the 2012 Act	Sets out how commissioners determine which services must be secured
	4: Conduct of HSA	Applies Schedule 1 which sets out details of the HSA procedure
	5: Transfer schemes	Applies Schedule 2 which provides for the transfer of services as a going concern to alternative providers
	6 – 10: Restrictions on commencing insolvency procedures and enforcement of security	Gives Monitor the opportunity to seek an HSA order in appropriate cases
	11: Indemnities	Enables Monitor to provide compensation from special funding arrangements
	12: Moving from HSA to administration	Provides an exit route from HSA to 'ordinary' administration
	13: List of relevant providers	Requires Monitor to publish details of providers within the scope of the HSA regime
Schedule 1 - Conduct of HSA	Part 1 – Application and modification of Schedule B1 to the IA86	Applies the administration procedure set out in the IA86 with modifications where needed
	Part 2 – Further Schedule B1 modifications for non-GB companies	Sets out changes to make HSA workable for non-GB companies
	Part 3 – Other modifications	Makes changes in the application of other parts of the insolvency legislation
Schedule 2 - Transfer schemes		Enables the objective of HSA to be achieved through the transfer of services and associated assets to alternative providers

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Overview of Regulations 3 to 13

(a) Determining which NHS services would be secured - criteria for the purposes of section 129(1) of the 2012 Act (regulation 3)

31. This regulation sets out how commissioners should decide which NHS services would need to be secured if a company fails. The provisions in regulation 3 are similar to those for foundation trusts set out in the 2012 Act¹⁷ and set out that:

- If a company enters HSA, commissioners would need to determine which NHS services should be secured by the health special administrator to meet the needs of patients. In making that decision, commissioners would have to consider whether the withdrawal of a service would significantly impact on the health of patients or increase health inequalities.
- To assist commissioners, Monitor is required to publish guidance which must be approved by the Secretary of State and the NHS Commissioning Board ('the Board') and commissioners must consider that guidance when making their decisions.
- The Board would have an important role in ensuring agreement between commissioners and, where agreement cannot be achieved, the Board would decide which services had to be secured.

32. It will be important for patients, the health special administrator and those with a financial interest in the company that an appropriate determination of which services must be secured is made promptly and further details will be set out in guidance to commissioners to be published by Monitor.

Question (2): Should the regulations include a time limit for commissioners to make a decision on which services must be secured? If so, what sort of time limit would be appropriate; for example 7 or 14 days? Should Monitor be able to extend that time limit in large or complex cases?

(b) Restrictions on starting insolvency proceedings and enforcing security (regulations 6 to 10)

33. Regulations 6 to 10 impose restrictions on steps being taken to begin ordinary insolvency proceedings and also the enforcement of security against a company's property. These provisions are consistent with existing special administration regimes.

¹⁷ Section 175 of the 2012 Act.

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34. Through conditions imposed under licensing arrangements, Monitor should be aware that a provider is in genuine financial difficulty before creditors, a company or its directors, etc. take action to start insolvency proceedings. In cases where a provider is insolvent and where HSA would be in the best interests of patients, Monitor could seek an HSA order from the court – Monitor would not need to wait for others to try to commence insolvency proceedings before taking action to start HSA.
35. Regulations 6 to 10 are additional safeguards to ensure that Monitor has the opportunity to intervene, to protect the interests of patients, where steps are taken to put a company into formal insolvency (administration or liquidation) or to enforce security over a company's property. These safeguards might be needed in the event of the sudden failure of a company, or where there has been fraud or other action to conceal a provider's difficulties.
36. These safeguards work by requiring appropriate notice to be served on Monitor. If Monitor does not take action within 14 days to commence HSA, or Monitor gives notice that it does not intend to trigger HSA, then ordinary insolvency or the enforcement of security could proceed.
37. Monitor would not have to wait for 14 days in order to take action to start HSA, it could seek an HSA order from the court at any time where a company is insolvent (the company is, or is likely to become, unable to pay its debts).
38. Putting a company into HSA would be a significant step and is likely to incur substantial costs. Monitor would therefore need to consider on a case-by-case basis whether applying for an HSA order would be a proportionate response in the circumstances.
39. There are technical concerns with two of these provisions which are explored below.

Question (3): Do you think that it is appropriate to apply the restrictions in regulations 6 to 10 on commencing ordinary insolvency and enforcing security to 'relevant providers'? What would be the impact on cost of capital? Do you think any alternative safeguards might be required?

Regulation 7 - 'Restrictions on voluntary winding up'

40. Regulation 7 sets out restrictions on the commencement of voluntary winding up. As drafted, this is consistent with existing special administration regimes.

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41. Winding up generally involves selling a company's assets and distributing the proceeds to creditors. A company would usually stop trading as soon as it enters liquidation except where continuing some part of its business would benefit the winding up.¹⁸
42. There are two types of voluntary winding up, although both commence by a company's members passing an appropriate resolution¹⁹:
- a creditors' voluntary winding up - an insolvent liquidation, and
 - a members' voluntary winding up - a solvent liquidation²⁰.
43. A members' voluntary winding up requires the directors to make a declaration that the company will be able to fully pay its debts within a set period of time (1 year or less)²¹. If the liquidator determines that the company will be unable to fully pay its debts, a meeting of creditors is held and the winding up converts to a creditors' voluntary liquidation²².
44. Regulation 7 would apply to both types of winding up, although if a company is solvent (i.e. qualifies for a members' voluntary liquidation) then it could not be subject to HSA as the court could only make an HSA order if the company is unable, or is likely to become unable, to pay its debts.
45. It may therefore be appropriate to exclude members' voluntary liquidation from regulation 7, although it may still be necessary to introduce an additional safeguard where it is proposed to convert to a creditors' voluntary liquidation.

Question (4): Should a members' voluntary liquidation be excluded from the restrictions on voluntary winding set out in regulation 7? If so, do you think safeguards should be included where it is proposed to move a company from a members' to a creditors' voluntary liquidation?

Regulation 9 - 'Restrictions on administrator appointments by creditors etc'

46. This regulation imposes restrictions where a floating charge-holder, the company or its directors seek to appoint an administrator directly (i.e. without a court order)²³.

¹⁸ Section 87 of the IA86.

¹⁹ Section 84 of the IA86.

²⁰ Section 90 of the IA86.

²¹ Section 89 of the IA86.

²² Sections 95 and 96 of the IA86.

²³ Paragraphs 14 and 22 of Schedule B1 to the IA86.

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47. The draft regulation provides that an administrator may not be appointed where a company is subject to HSA or where an application for an HSA order has been made. Where neither of these conditions apply, the draft sets out requirements for the appointment of an administrator to take effect and gives Monitor 14 days to intervene to seek an HSA order from the court.
48. The current drafting is consistent with existing special administration regimes. There is, however, a concern that these provisions do not properly align with the process for appointing an administrator under the IA86 and also that the requirements may not fit with the time limits for an interim moratorium, which stop other insolvency proceedings and legal action being taken against a company and its property²⁴.
49. This potential problem arises from the restrictions in the draft regulation being linked to the filing of a notice of appointment of an administrator with the court²⁵. This may not cause any difficulties where Monitor either acts quickly to apply for an HSA order or gives prompt notice that it does not intend to seek such an order. But there are risks that the requirements in the draft regulation could leave a company in limbo (because an administrator has been appointed but that appointment cannot take effect for 14 days) or potentially put assets in jeopardy (because the interim moratorium may expire before steps are taken to commence HSA or Monitor confirms that it will not be seeking an HSA order).
50. One solution may be to require notice at an earlier stage, in effect requiring a 'notice of intention to appoint' an administrator to be provided to Monitor²⁶ and allowing Monitor 14 days from the date of that notice to intervene to seek an HSA order where necessary. Further amendments may then be needed to provide consistency with requirements in the insolvency legislation for notices to be sent to other persons and to ensure that the interim moratorium provisions cover this 14 day period.

Question (5): Is regulation 9 fit for purpose or are changes needed to make this more compatible with the steps required to appoint an administrator? Assuming there is a problem, would it be sensible to require a 'notice of intention to appoint' an administrator to be given to Monitor or is there a better solution?

²⁴ Paragraph 44 of Schedule B1 to the IA86.

²⁵ Paragraphs 18 and 29 of Schedule B1 to the IA86.

²⁶ Similar to a notice of intention to appoint under paragraph 26 of Schedule B1 to the IA86 or the requirements under paragraph 15(1) of that Schedule.

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Indemnities (regulation 11)

51. These provisions would enable Monitor to provide indemnities (compensation payments) to specified persons, including the health special administrator and their employees.
52. Indemnities may be agreed in relation to liabilities incurred in carrying out the functions of a health special administrator or loss or damage sustained as a result. Such indemnities would be provided as part of the special financing arrangements for HSA and may be required to ensure that an insolvency practitioner is willing to act as the health special administrator, which is likely to involve them carrying out functions that they may not undertake in standard insolvency procedures.

Question (6): Do you think that the indemnity provisions are sufficient? If not, what changes would you like to see?

Moving from HSA to administration (regulation 12)

53. The continuity of service objective of HSA may be achieved by:
 - rescuing the provider as a going concern, and/or
 - the transfer of NHS services that must be secured to one or more alternative providers.
54. Where HSA facilitates a corporate rescue, the HSA proceedings would end and the ordinary rights of creditors would resume, although this could be subject to the terms of any formal voluntary arrangement agreed by creditors.
55. Where the objective of HSA is achieved through the transfer of services to an alternative provider or providers, the HSA proceedings would be brought to an end and a number of outcomes are possible, including a move to liquidation to distribute assets to creditors. Alternatively, if no assets remain to be distributed to creditors, the company could be moved to dissolution to end its legal existence. These are also standard exit routes in existing special administration regimes.
56. To provide flexibility, and ensure that the outcome is in the best interest of creditors, regulation 12 enables a company to be moved from HSA to 'ordinary' administration. This is achieved by allowing a health special administrator, with Monitor's consent, to apply to the court for the making of an administration order. This may, for example, be the most

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appropriate outcome where the objective of HSA has been achieved through the transfer of NHS services and where other parts of the company's business could be rescued as a going concern, or where administration would produce a better result for creditors than moving straight to liquidation.

57. This is considered in the impact assessment published alongside this consultation paper.

Question (7): Is it sensible to include an exit route from HSA to 'ordinary' administration by allowing a health special administrator to apply to the court for the making of an administration order? If so, what would be the costs and benefits of an exit route to 'ordinary' administration?

List of relevant providers (regulation 13)

58. HSA could be applied to insolvent companies providing NHS services that are subject to continuity of service licensing conditions.

59. To ensure that patients, employees, suppliers, lenders and others with an interest in the company are aware that the provider is within scope of HSA, regulation 13 sets out that Monitor must create a register of 'relevant providers', which must be kept up to date.

60. The intention is that this register would be open to the public, for example via the internet, and would provide details (e.g. company name and number, trading name, registered office/ trading address) to identify providers that could be subject to HSA if they became insolvent. The register would, for example, be a way for creditors to identify that a company is a 'relevant provider' and therefore ordinary insolvency proceedings could not begin unless certain requirements to give notice to Monitor had been satisfied.

61. Monitor will need to further consider how the register would operate in practice, and further details may be set out in the final regulations or rules for the HSA regime.

Question (8): Apart from basic details to enable a company to be identified as a 'relevant provider', should any further information be set out in the register?

Conduct of HSA - applying and making changes to the insolvency legislation (Schedule 1 to the draft HSA regulations)

62. Schedule 1 to the draft regulations applies and, where necessary, amends the process of administration²⁷. A copy of the draft regulations is included at **Annex C**, while **Annex D** shows how the administration procedure is applied and altered.
63. This part of the consultation explains, and seeks views on, the changes made to the 'ordinary' administration procedure.

a) Nature of HSA²⁸

64. Some important features of HSA are set out in the 2012 Act²⁹, for example:

- HSA is court-based and could only start by court order;
- the court would appoint an insolvency practitioner to be the health special administrator;
- the objective of HSA is to protect the interests of patients, by securing continuity of NHS services in line with commissioners' requirements; and
- there would be no time limit for the process but the health special administrator would have to act quickly and efficiently.

65. As set out in regulations 6 to 9, there will be restrictions on starting standard insolvency procedures to ensure that Monitor can intervene where necessary. To ensure fairness, HSA would not be able to start where a company is already in administration or liquidation³⁰.

b) Appointment of health special administrator by court³¹

66. HSA could start in one of two ways:

- Monitor applies to the court for an HSA order, or
- the court makes an HSA order where the Secretary of State for Business, Innovation and Skills applies for a company to be wound up in the public interest.

²⁷ As detailed in Schedule B1 to the IA86.

²⁸ Paragraphs 1 to 9 of Schedule B1 – see paragraphs 3 to 5 of Schedule 1 to the draft HSA regulations

²⁹ Sections 128 and 129 of the 2012 Act.

³⁰ This point is being further considered in relation to possible changes to regulation 7.

³¹ Paragraphs 10 to 13 of Schedule B1 – see paragraphs 6 to 8 of Schedule 1 to the draft HSA regulations.

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67. In practice, it seems likely that HSA would start following action taken by Monitor. If Monitor decides that HSA is required to protect patients' interests because the company is insolvent, Monitor can make an application to the court.
68. In keeping with 'ordinary' administration and other special administration regimes, the court would only be able to make a HSA order where the company is insolvent (meaning that it is, or is likely to become, unable to pay its debts). If a company is not insolvent, then Monitor would be able to take different action under licensing arrangements in order to secure service continuity.

Question (9): Should HSA only start where the company is insolvent or should there be any other grounds for starting the procedure?

c) Effect of HSA³²

Other insolvency and legal proceedings

69. As in 'ordinary' administration, the start of HSA would have immediate effects designed to enable the health special administrator to carry out their duties unimpeded and to prevent others from taking action against the company and its property.
70. It would be impractical for HSA to operate at the same time as other insolvency proceedings (for example, because office-holders would be competing to deal with the same assets) therefore where a company is in HSA:
- any administrative receiver must stop acting,
 - a receiver of part of the company's property must stop acting if required to do so by the health special administrator, and
 - the company cannot be put into liquidation (although the company could move from HSA to liquidation once the objective of HSA has been achieved).
71. The health special administrator will also need time, free from the pressure of creditors, to achieve the objective of HSA. To facilitate this, legal processes against the company and its property would only be allowed with the agreement of the health special administrator or

³² Paragraphs 40 to 45 of Schedule B1 – see paragraphs 9 to 12 of Schedule 1 to the draft HSA regulations.

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the court's permission. To prevent a scramble for assets in the period immediately before the start of HSA, similar restrictions would also apply from the time that Monitor makes an HSA application until the court makes an HSA order (or dismisses the application).

72. All of these provisions are consistent with the effects of an 'ordinary' administration.

Publicity

73. It will be important that patients and those doing business with the company are aware that it is subject to HSA. To achieve this, the regulations adopt standard provisions requiring all 'business documents' to include notification that a health special administrator has been appointed. The legislation defines a 'business document' as:

- an invoice,
- an order for goods and services,
- a business letter, and
- an order form.

74. Given the large amount of paperwork that is likely to be generated by a provider of health care services, adjusting all 'business documents' may significant costs. In addition, the failure of a health care provider is in any case likely to be well publicised (e.g. in the media) and it could be argued that these costs may be unnecessary.

75. This is considered in the impact assessment published alongside this consultation paper.

Question (10): Do you think that the general definition of 'business document' should be adjusted for health care providers, for example to specifically exclude prescriptions or other items? To help inform our analysis, we would be grateful for any evidence of costs and benefits of any exemptions.

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d) Process of HSA (including consultation on health special administrator's proposals)³³

Advertisement

76. It will be important to ensure that interested parties are aware that a provider is subject to HSA. Following the making of an order, the health special administrator will be required to advertise their appointment in the press and give appropriate notice directly to:

- the relevant provider,
- the provider's creditors, and
- Companies House.

77. The rules will set out further details of persons to be notified of a health special administrator's appointment, which will include relevant health sector bodies.

Statement of the company's financial affairs

78. The health special administrator of a provider will need to understand its financial position in order to inform their decisions and so that they can provide information to creditors and other interested parties.

79. Where a provider has passed through the distress phase and into failure, contingency planning may be a useful source of information and, in all cases, the health special administrator will be able to obtain information (including details of the company's business, assets and debts) from people with knowledge of the company and its affairs.

Service continuity plans to achieve the objective of HSA

80. Reflecting the unique requirements of the health care sector, this is an area where the regulations propose significant changes from both the 'ordinary' administration process and existing special administration regimes. The following sections explain these changes.

'Ordinary' administration

81. In an 'ordinary' administration, the administrator develops proposals for achieving the purpose of the administration and sends details to creditors within 8 weeks of the start of the administration³⁴. The administrator will often³⁵ invite creditors to attend a meeting,

³³ Paragraphs 46 to 58 of Schedule B1 – paragraphs 13 to 16 of Schedule 1 to the draft HSA regulations.

³⁴ Paragraph 49 of Schedule B1 to the IA86 - 'Administrator's proposals'.

³⁵ Paragraph 52 of Schedule B1 to the IA86 sets out circumstances in which a meeting would not be held, for example where debts due to creditors would be fully paid.

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within 10 weeks of the start of the administration³⁶, at which the creditors will decide whether to³⁷:

- accept or reject the administrator's proposals; or
- agree changes to the proposals with the administrator.

82. If the administrator's proposals are rejected, the administrator is required to report to the court which has wide powers to make an appropriate order, which could include ending the administrator's appointment³⁸.

83. Where the administrator's proposals are accepted (with or without any changes) the administrator can change them at a later date, for example because of a change in circumstances but any substantial changes must be agreed with the company's creditors³⁹.

Special administration regimes

84. In existing special administration regimes, the special administrator is required to develop proposals to secure service continuity. Those proposals would be sent to creditors for information, but the creditors could not decide whether to accept, reject or modify those proposals. Similarly, the special administrator could alter their proposals over time, but there would be no requirement to agree those changes with creditors and any revised plans would be issued for information only.

85. The main reason for not putting proposals to creditors for their agreement is that the primary objective of special administration is to ensure the continued supply of essential public services, which would be achieved through special funding arrangements. Any delays, or disagreements over plans, could jeopardise service provision or significantly increase the costs of the proceedings.

86. A special administrator could hold a meeting of creditors during the course of a special administration, for example to exchange information, but the creditors would not be able to

³⁶ Paragraph 51 of Schedule B1 to the IA86 - 'Requirement for initial creditors' meeting'.

³⁷ Paragraph 53 of Schedule B1 to the IA86 - 'Business and result of initial creditors' meeting'.

³⁸ Paragraph 55 of Schedule B1 to the IA86 - 'Failure to obtain approval of administrator's proposals'.

³⁹ Paragraph 54 of Schedule B1 to the IA86 - 'Revision of administrator's proposals'.

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vote at such a meeting on whether to accept the administrator's overall proposals for achieving continuity of services.

Trust special administration regime for foundation trusts

87. Arrangements for dealing with unsustainable NHS trusts and foundation trusts are unique to the health care sector. Those regimes focus on securing continuity of NHS services but are not based on insolvency law.

88. The unsustainable provider regime for foundation trusts allows for the appointment of a trust special administrator by Monitor where a trust is financially unsustainable. The trust special administrator would take control of the foundation trust and would develop plans for securing service continuity. Those plans would be subject to a 6-week public consultation process.

Health special administrator's proposals

89. The draft HSA regulations apply the general requirements for an administrator to issue proposals for achieving the objective of HSA, but significant changes are proposed to the process for agreeing those plans as follows:

- before proposals can be agreed, commissioners would need to determine which NHS services must be secured;
- no meeting of creditors would be held to consider the proposals;
- in all cases, the health special administrator would need to agree proposals with commissioners and Monitor, and issue the agreed proposals within 8 weeks of the start of HSA (although that period could be varied by Monitor or the court);
- the health special administrator would be obliged to consult publically where implementing the proposals would involve a 'significant variation' in the provision of NHS services; for example, where it is proposed to transfer services to providers at different locations which would impact on access to those services. The consultation process would be similar to the requirements for consultation in the trust special administration regime for foundation trusts and the proposals could be revised as a result of responses to the consultation;

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- where public consultation is not required, because service continuity could be achieved quickly and would not involve significant variation of services, the health special administrator would issue proposals for information;
- the health special administrator could revise the proposals (more than once) but where those changes were substantial (and, in all cases, where the original proposals had been subject to public consultation) those revisions would need to be agreed with commissioners and Monitor.

90. The main reasons for introducing these requirements in HSA are to:

- ensure that commissioners and Monitor are content with the health special administrator's proposals for securing continuity of NHS services;
- enable patients and other interested parties to comment on proposals involving a significant variation in the provision of NHS services; and
- provide flexibility to enable service continuity to be achieved quickly, and to potentially reduce costs, by setting out that public consultation may not be required in some cases.

91. The draft regulations would oblige public consultation if the implementation of the health special administrator's proposals would involve a 'significant variation in the health care services which are provided as part of the NHS'. In some cases, public consultation may not be necessary; for example, where it is possible to rescue the company, or secure business continuity, without moving the provision of services to other locations.

92. The proposed consultation requirements reflect the high level of public interest in service provision. The intention is that this would capture cases where implementing service continuity plans would involve a significant reconfiguration of NHS services and that determination would need to be made on a case-by-case basis by Monitor and commissioners as part of the process of agreeing proposals.

93. The consultation process would be similar to the requirements for consultation on service continuity plans in the trust special administration regime for foundation trusts. As highlighted, there are fundamental differences between the trust special administration

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regime and HSA. Because HSA is based on insolvency law, including such consultation requirements therefore carries risks.

94. There is a risk that including a 6-week period of public consultation may lengthen the duration of HSA, add to uncertainty, delay repayments to creditors and add significantly to costs (particularly where funding is required to secure continuity of loss-making services). This would be an additional burden on the financial assistance mechanisms to be established by Monitor, and is likely to impact on the level of contributions required by levy payers. The uncertainty pending completion of the consultation process could itself jeopardise securing service continuity if it causes staff retention problems or leads to problems with suppliers.
95. The consultation requirements may also prevent continuity plans from being achieved quickly in some cases, where prompt action would otherwise produce the best outcomes for both patients and those with a financial interest in the failed provider.
96. There is also a risk that the requirement to consult where proposals would involve a 'significant variation' in service provision sets quite a low threshold. This may oblige consultation in most cases leading to unnecessary delays, uncertainty and additional costs.
97. It may be possible to mitigate some of these risks by changing the requirements and one possibility may be to link the requirement to consult to access to services; for example, by obliging consultation where implementing service continuity proposals would lead to a substantial reduction in access to NHS services.
98. An alternative approach could be to allow decisions on whether public consultation is required to be made on case-by-case basis. This would provide greater flexibility and enable all the circumstances of a particular case to be considered, including the costs associated with consultation, whether continuity can be achieved quickly and the likely extent of public interest in the continuity proposals. This could be achieved by requiring the service continuity proposals to be subject to consultation at the direction of Monitor, or at the direction of Monitor and commissioners. Given Monitor's key function in the HSA procedure, to provide clarity and speed up decisions, it may be appropriate for Monitor to make this decision; otherwise there is a risk of disagreement leading to further delays and uncertainty.

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99. The costs and benefits of these proposed requirements are considered in the impact assessment published alongside this consultation paper.

Question (11): Is 8 weeks enough time for the health special administrator to develop and agree proposals? Is it a sufficient safeguard to provide for this to be varied on a case-by-case basis by Monitor or the court?

Question (12): Should service continuity plans be subject to public consultation? If so, should this be a requirement in all cases or only those which would involve a significant change in the provision of, or access to, NHS services?

Question (13): What sort of criteria should be included in the regulations to determine whether or not public consultation is required? Would it be preferable to base this on a 'significant variation' in services or a 'substantial reduction in access to services'? Do you have any other suggestions?

Question (14): Do you think it would be better to allow a decision on whether public consultation is required to be made on a case-by-case basis? If so, should that decision be made by Monitor or should this be agreed between Monitor and commissioners?

Assistance of Monitor

100. In an 'ordinary' administration, the company's creditors may decide to form a creditors' committee to carry out certain functions set out in the legislation⁴⁰; for example, the committee can require the administrator to attend meetings and provide information, it can also generally assist the administrator and has an important role in determining the administrator's remuneration.

101. Generally, it is not possible to set up a creditors' committee in special administration regimes and this reflects the absence of a meeting of creditors to vote on the special administrator's proposals.

⁴⁰ See paragraph 57 of Schedule B1 to the IA86 and Rules 2.50-2.64 of the Insolvency Rules 1986.

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102. To support Monitor's important role in the HSA regime, the draft regulations provide Monitor with similar powers and duties to that of a creditors' committee⁴¹. This is designed to:

- facilitate co-operation between Monitor and the health special administrator;
- provide a gateway for the exchange of information; and
- enable Monitor to hold the health special administrator to account for their actions.

(e) Functions of health special administrator⁴²

103. The health special administrator will take control of the company, its business and assets and will have very broad powers to enable them to carry out their functions. The health special administrator may:

- do anything necessary or expedient for the management of the affairs, business and property of the company, and the powers set out in Schedule 1 to the IA86 will apply;
- remove, or appoint, a company director;
- call meetings of the company's members or creditors;
- seek directions from the court;
- make payments to creditors; and
- deal with company property which is subject to security or a hire-purchase agreement.

104. The functions of an administrator are generally applied to the HSA regime with only minor modifications, but it is worth highlighting that:

- The health special administrator is specifically enabled to act on behalf of the company for the purposes of legislation conferring a power, or duty, on the

⁴¹ In keeping with the underlying insolvency legislation, it is proposed to set out further details in rules.

⁴² Paragraphs 59 to 75 of Schedule B1 to the IA86 – paragraphs 17 to 24 of Schedule 1 to the draft HSA regulations.

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company – this is designed to ensure that the health special administrator is able to act in relation to legislation relevant to the health sector.

- Where the health special administrator seeks directions, Monitor is able to make representations to the court and directions given by the court in relation to the management of the company must be consistent with the objective of HSA – this is a safeguard to ensure that Monitor can be heard in relation to directions which might affect the outcome of HSA.
- In applying paragraphs 71 ('charged property: non-floating charge') and 72 ('hire-purchase property') of Schedule B1 to the IA86, the references to 'market value' are amended to 'appropriate value'. Appropriate value is defined⁴³ as 'the best price which would be reasonably available on a sale which is consistent with the achievement of the objective of the HSA'. This is to help ensure that the objective of HSA can be achieved and is consistent with the approach taken in other special administration regimes.

105. In order to safeguard the interests of those with a financial interest in the failed company, the HSA regulations also apply provisions which:

- protect the position of secured and preferential creditors;
- enable creditors and members to challenge the conduct of the health special administrator; and
- allow the court to examine to examine the conduct of the health special administrator or former administrator where there is evidence of wrongdoing.

106. The most significant amendments to these provisions are in relation to applying paragraph 74 of Schedule B1 ('challenge to health special administrator's conduct of company'). These changes enable Monitor to present evidence to the court and, to minimise impacts on patients, enable the court to give the health special administrator time to rectify their actions. These modifications are consistent with special administration regimes in other regulated sectors.

⁴³ Amendment to paragraph 111 of Schedule B1 to the IA86 in paragraph 41 of Schedule 1 to the draft HSA regulations.

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(f) Ending HSA⁴⁴

107. Administration is a flexible procedure and there are a number of possible exit routes, some of which are linked to the way in which the proceedings begin. Special administration regimes, on the other hand, can only commence by court order and the exit routes are also restricted to reflect the continuity objectives of those regimes.

108. In general, HSA would end in similar ways to other special administration regimes but an additional exit-route to 'ordinary' administration is provided in the draft regulations.

109. HSA could be brought to an end in the following ways:

- Court order: Where the objective of HSA has been achieved (the continuity of services has been secured) either Monitor or the health special administrator (with Monitor's consent) could apply to the court for HSA to end. This would be appropriate, for example, where the company is rescued as a going concern. Alternatively, the health special administrator may seek an order to end HSA where they think that the objective of HSA cannot be achieved or no longer needs to be achieved – this may, for example, be appropriate where commissioners determine that there are no services that need to be secured.
- Moving to 'ordinary' administration: The health special administrator may, with Monitor's consent, apply to the court to end HSA and make an 'ordinary' administration order. This may, for example, be appropriate where the objective of HSA has been achieved through the transfer of NHS services to one or more alternative providers and moving the remainder of the company into administration would result in a going concern rescue or a better result for creditors than an immediate liquidation.
- Moving to creditors' voluntary liquidation: Where the continuity of NHS services has been secured through transfers and a rescue of the company as a going concern is not considered feasible, the company could be moved to liquidation to distribute remaining assets to creditors.
- Moving to dissolution: If the objective of HSA has been achieved and no assets remain in the company (the company has in effect been wound up through HSA)

⁴⁴ Paragraphs 76 to 86 of Schedule B1 to the IA86 – regulation 12 ('Moving from HSA to administration') and paragraphs 25 to 29 of Schedule 1 to the draft HSA regulations.

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the health special administrator may, with agreement from Monitor, take steps to move the company to dissolution to bring its legal existence to an end.

(g) Replacing a health special administrator⁴⁵

110. The appointment of a health special administrator would stop where HSA ends. There may be also be circumstances where it is necessary to replace a health special administrator; for example, due to resignation, loss of qualification, or removal from office by the court, etc. The draft regulations apply provisions of the insolvency legislation to deal with this and where a person ceases to be a health special administrator, for any reason, they would be discharged from liability in respect of their actions⁴⁶.

Expenses of HSA and the ranking of creditors

111. In an administration, the costs and expenses of the proceedings would be paid before distributing any remaining funds to creditors. The priority of paying an administrator's remuneration and expenses is set out in paragraph 99 of Schedule B1 to the IA86⁴⁷ and these provisions are applied by the draft HSA regulations⁴⁸.
112. Certain liabilities are payable in priority to an administrator's remuneration and expenses, including liabilities arising under employment contracts adopted by the administrator.
113. Funding arrangements to ensure service continuity in the HSA regime must be established and operated by Monitor⁴⁹, and Monitor will be consulting on these financial arrangements in due course.
114. It would seem unfair to expect creditors to fund the costs of securing the continuity of NHS services. Likewise, it would seem inappropriate to divert funds from levy payers to an assistance fund to pay the general claims of creditors on failure. While details around financing have not yet been finalised, the Department of Health expects that, as a matter of principle, the funding arrangements for securing service continuity should operate in a way that does not generally make creditors any worse or better off than in an 'ordinary' administration.

⁴⁵ Paragraphs 87 to 99 of Schedule B1 of the IA86 – paragraphs 30 to 35 of Schedule 1 to the draft HSA regulations.

⁴⁶ Paragraph 98 of Schedule B1 to the IA86 – paragraph 34 of Schedule 1 to the draft HSA regulations.

⁴⁷ See also rule 2.67 of the Insolvency Rules 1986.

⁴⁸ Paragraph 35 of Schedule 1 to the draft HSA regulations.

⁴⁹ Chapter 6 of Part 3 of the 2012 Act.

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115. No changes are proposed to the normal hierarchy for paying the claims of creditors and the priority of repaying debts would be the same as in an ‘ordinary’ administration.

116. As in an ‘ordinary’ administration, the outcome for the company’s creditors is likely to depend on a number of factors, including:

- the causes of the company’s failure;
- the nature, complexity and realisable value of the company’s business and assets;
- the profitability of ongoing trading activity;
- the level of indebtedness and the extent to which assets may be subject to security;
- the duration and costs of proceedings, including the remuneration and expenses of the health special administrator; and
- the exit route from HSA.

(h) General provisions, including changes for companies registered in Scotland⁵⁰

117. The draft HSA regulations apply the ‘general’ provisions of Schedule B1 to the IA86 with some minor changes.

118. These include the provisions of ‘ordinary’ administration which apply to companies registered in Scotland, and which would equally apply to a company registered in Scotland that was providing NHS services, subject to Monitor’s continuity of services licensing regime, in England.

119. In keeping with the format of the underlying insolvency legislation, a separate statutory instrument will be needed to set out rules for companies registered in Scotland. This reflects the principle that a company registered in Scotland should enter administration in Scotland and differences between the law in Scotland and England.

⁵⁰ Paragraphs 100 to 116 of Schedule B1 to the IA86 – paragraphs 36 to 41 of Schedule 1 to the draft HSA regulations.

Changes for overseas companies (Part 2 of Schedule 1 to the draft regulations)

120. It is possible that a company providing NHS services, which are subject to licensing continuity conditions, might not be registered in Great Britain and the 2012 Act⁵¹ provides that HSA could be applied to secure continuity of services where the relevant provider is an overseas company⁵².
121. This part of the regulations sets out further changes to the HSA procedure where the failed company is registered overseas. These changes are needed as some parts of insolvency law work differently for these companies and because these companies may not be registered at Companies House. This approach is consistent with existing special administration regimes⁵³.
122. Where the provider is an overseas company, the 2012 Act and the draft regulations restrict the functions of the special administrator to dealing with the provider's business, affairs and property situated in Great Britain. This is also consistent with other special administration regimes.

Other changes (Part 3 of Schedule 1 to the draft regulations)

123. While the process of administration is set out in Schedule B1 to the IA86, other parts of that Act (and also separate legislation) are also relevant to administration. To make HSA work in practice, this part of the regulations sets out some general modifications and interpretations to ensure that other parts of the law apply to HSA as they do to 'ordinary' administration.
124. Important provisions are, for example, set out elsewhere in the IA86 which enable an administrator to take control of the company's property, recover assets disposed of before the start of an administration, and to gather information about the company and its property. This part of the regulations means that such provisions would also apply to HSA.

⁵¹ Section 128(9) of the 2012 Act.

⁵² Section 128(9) of the 2012 provides that a company for the purposes of HSA includes companies not registered under the Companies Act 2006. That definition is potentially broad enough to catch entities such as partnerships but in practice it is not considered likely that it should be necessary to use HSA for such entities. Therefore the regulations do not include any modifications for partnerships and other entities that might be classed as 'GB unregistered companies'. It may be desirable over time to widen the scope of HSA and this would require changes to the regulations to reflect changes for different types of entities contained in the insolvency and related legislation.

⁵³ For example, Part 2 of Schedule 10 to the Postal Services Act 2011 and Part 3 of Schedule 20 to the Energy Act 2004.

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125. Other legislation outside of the IA86 is also relevant to administration and these provisions mean that this legislation would also apply to HSA. For example, a health special administrator would have equivalent duties under the Company Directors Disqualification Act 1986 to consider the conduct of the company's directors and report to the Secretary of State for Business, Innovation and Skills. This may lead to action being taken in the public interest to disqualify directors where there is evidence of misconduct or other wrongdoing.
126. The continuity of services objective of HSA could be achieved through the rescue of a provider as a going concern where a company voluntary arrangement is agreed with creditors under Part 1 of the IA86. This part of the regulations sets out some safeguards to ensure an appropriate transition from HSA to a company voluntary arrangement.
127. This approach is again consistent with other special administration regimes.

Transferring NHS services to alternative providers (Schedule 2 to the draft regulations)

Introduction

128. The 2012 Act provides that the continuity of services objective of HSA may be achieved by rescuing the failed company as a going concern and/or the transfer of services to one or more alternative providers⁵⁴.
129. A going concern rescue is given priority as this should, in most cases, produce the best outcome for both patients (continuity is secured) and the company's creditors (a rescue should maximise returns).
130. There may, however, be circumstances where a rescue is not possible, or the best outcome may be to transfer some or all services to an alternative provider or a number of different providers. The 2012 Act therefore allows for the transfer of services where:
- a rescue is not feasible or where transfers would assist a rescue;
 - a rescue would not secure service continuity, or a combination of transfers and rescue is needed to achieve continuity;
 - transfers would produce a better outcome for the company's creditors as a whole or the company's members.

⁵⁴ Section 129 of the 2012 Act.

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131. In deciding the appropriate course of action to achieve service continuity, the health special administrator would also need to consider the obligation to, so far as is consistent with achieving the continuity objective, act in a way which protects the interests of the company's creditors (and subject to those interests, protects the interests of the company's members)⁵⁵.
132. A transfer is likely to involve a sale of assets required to deliver NHS services to an alternative provider and the arrangements could include a transfer of property, employees and liabilities.
133. A transfer could, but may not necessarily, involve a physical relocation of services; for example, the company's business or parts of it may be bought out by an alternative provider and service provision may continue from the same location but under new ownership. Users of NHS services may therefore not notice any major changes in service delivery.
134. The 2012 Act enables further details about transfer arrangements to be set out in the HSA regulations.

Transfer schemes

135. Schedule 2 to the draft regulations sets out details of transfer schemes arrangements and this is based on provisions in existing special administration regimes.
136. This part of the draft regulations refers to the company which is subject to HSA as the 'old provider' and the provider taking on the provision of services is called the 'new provider' (this could be an existing provider or a new entrant).
137. The details of a transfer of services would need to be agreed on a case-by-case basis between the old and new provider. As a safeguard for patients, the transfer arrangements

⁵⁵ Sections 128(6)(c) and (d) of the 2012 Act.

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would also need to be approved by Monitor⁵⁶. Monitor could modify the transfer arrangements but those changes would need to be agreed by the old and new provider⁵⁷.

138. The transfer scheme in a particular case would set out details of the property, rights and liabilities to be transferred from the old provider to the new provider. The scheme may also make provision for dividing and altering interests and rights between the new and old provider⁵⁸ and a scheme may include the transfer of statutory functions⁵⁹.

139. Staff may be transferred as part of a transfer scheme and the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply.

140. If an overseas company enters HSA, the 2012 Act provides that the proceedings would only deal with the affairs, business and property of the company located in Great Britain⁶⁰ and a transfer scheme would accordingly be restricted to dealing with the transfer of property, rights and liabilities in Great Britain⁶¹. This is consistent with the approach in other special administration regimes.

Question (15): Are the provisions of Schedule 2 appropriate to enable the transfer of services and associated assets as a going concern to one or more alternative providers to secure continuity of NHS services?

Question (16): Are any of the provisions of Schedule 2 unnecessary or likely to cause difficulties?

Question (17): Should any other areas be covered in the transfer scheme arrangements?

⁵⁶ Paragraph 4(6) of Schedule 2 to the draft HSA regulations.

⁵⁷ Where resolution is achieved through a 'hive-down' under section 129(4)(a) of the 2012 Act, then only the old provider needs to consent to modifications.

⁵⁸ Paragraph 7 of Schedule 2 to the draft HSA regulations.

⁵⁹ Paragraph 8 of Schedule 2 to the draft HSA regulations.

⁶⁰ Section 128(7) of the 2012 Act.

⁶¹ Paragraph 19 of Schedule 2 to the draft HSA regulations.

Annex A: Summary of consultation questions

Question (1): Could the proposals have any perceived or potential impact on equality including people sharing protected characteristics under the Equality Act 2010?

Question (2): Should the regulations include a time limit for commissioners to make a decision on which services must be secured? If so, what sort of time limit would be appropriate; for example 7 or 14 days? Should Monitor be able to extend that time limit in large or complex cases?

Question (3): Do you think that it is appropriate to apply the restrictions in regulations 6 to 10 on commencing ordinary insolvency and enforcing security to 'relevant providers'? What would be the impact on cost of capital? Do you think any alternative safeguards might be required?

Question (4): Should a members' voluntary liquidation be excluded from the restrictions on voluntary winding set out in regulation 7? If so, do you think safeguards should be included where it is proposed to move a company from a members' to a creditors' voluntary liquidation?

Question (5): Is regulation 9 fit for purpose or are changes needed to make this more compatible with the steps required to appoint an administrator? Assuming there is a problem, would it be sensible to require a 'notice of intention to appoint' an administrator to be given to Monitor or is there a better solution?

Question (6): Do you think that the indemnity provisions are sufficient? If not, what changes would you like to see?

Question (7): Is it sensible to include an exit route from HSA to 'ordinary' administration by allowing a health special administrator to apply to the court for the making of an administration order? If so, what would be the costs and benefits of an exit route to 'ordinary' administration?

Question (8): Apart from basic details to enable a company to be identified as a 'relevant provider', should any further information be set out in the register?

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Question (9): Should HSA only start where the company is insolvent or should there be any other grounds for starting the procedure?

Question (10): Do you think that the general definition of 'business document' should be adjusted for health care providers, for example to specifically exclude prescriptions or other items? To help inform our analysis, we would be grateful for any evidence of costs and benefits of any exemptions.

Question (11): Is 8 weeks enough time for the health special administrator to develop and agree proposals? Is it a sufficient safeguard to provide for this to be varied on a case-by-case basis by Monitor or the court?

Question (12): Should service continuity plans be subject to public consultation? If so, should this be a requirement in all cases or only those which would involve a significant change in the provision of, or access to, NHS services?

Question (13): What sort of criteria should be included in the regulations to determine whether or not public consultation is required? Would it be preferable to base this on a 'significant variation' in services or a 'substantial reduction in access to services'? Do you have any other suggestions?

Question (14): Do you think it would be better to allow a decision on whether public consultation is required to be made on a case-by-case basis? If so, should that decision be made by Monitor or should this be agreed between Monitor and commissioners?

Question (15): Are the provisions of Schedule 2 appropriate to enable the transfer of services and associated assets as a going concern to one or more alternative providers to secure continuity of NHS services?

Question (16): Are any of the provisions of Schedule 2 unnecessary or likely to cause difficulties?

Question (17): Should any other areas be covered in the transfer scheme arrangements?

Annex B: How to respond to the consultation

Responding to the consultation

We would welcome responses to all of the questions above as well as any additional comments that you would like to make. An online response form can be found alongside this document on our website. Please use this to record your responses and comments. Alternatively, you can use the Word response form on our website or email your responses to: **hsa.consultation@dh.gsi.gov.uk**

If you do not have internet or email access, then please write to:

Sector Regulation Team
Room 229, Richmond House
79 Whitehall
London SW1A 2NS

Please submit your responses to the questions and any other comments that you have by 5pm on 4 January 2013.

If you wish to do so, you can request, via the online / Word response form on our website, that your name and/or organisation be kept confidential and excluded from the published summary of responses. Please mark email or postal responses in a similar way in order to ensure confidentiality.

Please note that we may use your details to contact you about your responses or to send you information about our future work. We do not intend to send responses to each individual respondent. However, we will analyse responses carefully and give clear feedback on how we have developed the regulations as a result.

Commenting on the consultation process

If you have concerns or comments which you would like to make relating specifically to the consultation process itself please contact:

Consultations Coordinator
Department of Health
3E48, Quarry House
Leeds, LS2 7UE

e-mail: consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address.

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Confidentiality of information

If you would like any part of the content of your response (as distinct from your identity) to be kept confidential, you may say so in a covering letter. We would ask you to indicate clearly which part(s) of your response are to be kept confidential. We will endeavour to give effect to your request but as a public body subject to the provisions of the Freedom of Information legislation, we cannot guarantee confidentiality.

We manage the information you provide in response to this consultation in accordance with the Department of Health's Information Charter.

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and, in most circumstances, this will mean that your personal data will not be disclosed to third parties.

Summary of consultation responses

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the consultations website at:

<http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm>

Annex C: Draft HSA regulations

Draft Regulations laid before Parliament under section 304(5) of the Health and Social Care Act 2012, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2013 No.

HEALTH

The Health Special Administration Regulations 2013

Made - - - - - ***

Coming into force in accordance with regulation 1

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 129(1), 130 to 132 and 304(1), (2), (9) and (10) of the Health and Social Care Act 2012⁽⁶²⁾.

Before laying these Regulations before Parliament in draft, the Secretary of State consulted in accordance with section 130(11) of that Act.

A draft of these Regulations has been laid before and approved by resolution of each House of Parliament in accordance with section 304(5) of that Act.

Citation and commencement

1. These Regulations may be cited as the Health Special Administration Regulations 2013 and shall come into force.....

Interpretation etc

2.—(1) In these Regulations-

“the 1986 Act” means the Insolvency Act 1986⁽⁶³⁾,

“the 2012 Act” means the Health and Social Care Act 2012, and

“the Board” means the National Health Service Commissioning Board.

(2) Sections 148 and 149 of the 2012 Act (service of documents and electronic communications) are to apply for the purposes of these Regulations as they apply for the purposes of Part 3 of the 2012 Act.

⁽⁶²⁾ 2012 c. 7.
⁽⁶³⁾ 1986 c. 45.

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Criteria for the purposes of section 129(1) of the 2012 Act etc

3.—(1) The commissioners of the health care services provided for the purposes of the NHS by a company subject to a health special administration order may determine that the objective set out in section 129(1) of the 2012 Act is to apply to a service only if they are satisfied that the criterion in sub-paragraph (2) is met.

(2) The criterion is that ceasing to provide the service would, in the absence of alternative arrangements for its provision as part of the NHS, be likely to—

- (a) have a significant adverse impact on the health of persons in need of the service or significantly increase health inequalities, or
- (b) cause a failure to prevent or ameliorate either a significant adverse impact on the health of such persons or a significant increase in health inequalities.

(3) Monitor must publish guidance about the application of the criterion mentioned in paragraph (2).

(4) Monitor may revise that guidance and, if it does so, must publish the guidance as revised.

(5) Before publishing guidance under this regulation, Monitor must obtain the approval of the Secretary of State and the Board.

(6) In applying the criterion mentioned in paragraph (2), the commissioners concerned must have regard to guidance published under this regulation.

(7) The Board must make arrangements for facilitating agreement between the commissioners concerned in determining the health care services to which the objective set out in section 129(1) of the 2012 Act is to apply.

(8) If the commissioners concerned fail to reach agreement in pursuance of arrangements under paragraph (7), the Board may make the determination (and the duty imposed by section 129(1)(a) of the 2012 Act, so far as applying to those commissioners, is to be regarded as discharged).

(9) In this regulation “health inequalities” means the inequalities between persons with respect to the outcomes achieved for them by the provision of services that are provided as part of the NHS.

Conduct of health special administration

4. Schedule 1 (which applies the provisions of Schedule B1 to the 1986 Act about administration orders and certain other enactments to health special administration orders) has effect.

Transfer schemes

5. Schedule 2 (which makes provision for transfer schemes to achieve the object of a health special administration order) has effect.

Restrictions on winding-up orders

6.—(1) This regulation applies if a person other than the Secretary of State or Monitor petitions for the winding-up of a relevant provider.

(2) The court may not exercise its powers on a winding-up petition unless—

- (a) notice of the petition has been served on Monitor, and
- (b) either or both of the following have occurred—
 - (i) Monitor has informed the person who served the notice that it does not intend to apply for a health special administration order in relation to the relevant provider,
 - (ii) a period of 14 days has elapsed since the service of the notice.

(3) If an application for a health special administration order in relation to the relevant provider is made to the court under section 128 of the 2012 Act before a winding-up order is made on the petition, the court may exercise its powers under paragraph 13 of Schedule B1 to the 1986 Act (as that paragraph has effect by virtue of Schedule 1 to these Regulations), instead of exercising its powers on a winding-up petition.

(4) References in this regulation to the court’s powers on a winding-up petition are references to—

- (a) its powers under section 125 of the 1986 Act (other than its power of adjournment), and
- (b) its powers under section 135 of that Act.

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Restrictions on voluntary winding up

7.—(1) A relevant provider has no power to pass a resolution for voluntary winding up without the permission of the court.

(2) Permission may be granted by the court only on an application made by the relevant provider.

(3) The court may not grant permission unless—

(a) notice of the application has been served on Monitor, and

(b) either or both of the following have occurred—

(i) Monitor has informed the person who served the notice that it does not intend to apply for a health special administration order in relation to the relevant provider,

(ii) a period of 14 days has elapsed since the service of the notice.

(4) If an application for a health special administration order in relation to the relevant provider is made to the court under section 128 of the 2012 Act after an application for permission under this regulation has been made and before it is granted, the court may exercise its powers under paragraph 13 of Schedule B1 to the 1986 Act (as that paragraph has effect by virtue of Schedule 1 to these Regulations), instead of granting permission.

(5) In this regulation “a resolution for voluntary winding up” has the same meaning as in the 1986 Act.

Restrictions on making of ordinary administration orders

8.—(1) This regulation applies if a person (other than Monitor) makes an ordinary administration application in relation to a relevant provider.

(2) The court must dismiss the application if—

(a) a health special administration order is in force in relation to the relevant provider, or

(b) a health special administration order has been made in relation to the relevant provider but is not yet in force.

(3) If paragraph (2) does not apply, the court, on hearing the application, may not exercise its powers under paragraph 13 of Schedule B1 to the 1986 Act (other than its power of adjournment) unless—

(a) notice of the application has been served on Monitor,

(b) either or both of the following have occurred—

(i) Monitor has informed the person who served the notice that it does not intend to apply for a health special administration order in relation to the relevant provider,

(ii) a period of 14 days has elapsed since the service of the notice, and

(c) there is no outstanding application for a health special administration order in relation to the relevant provider.

(4) Paragraph 44 of Schedule B1 to the 1986 Act (interim moratorium) does not prevent, or require the permission of the court for, the making of an application for a health special administration order.

(5) On the making of a health special administration order in relation to a relevant provider, the court must dismiss any ordinary administration application made in relation to that relevant provider which is outstanding.

(6) In this regulation “ordinary administration application” means an application in accordance with paragraph 12 of Schedule B1 to the 1986 Act.

(7) In construing references in this regulation to Schedule B1 to the 1986 Act, Schedule 1 to these Regulations is to be ignored.

Restrictions on administrator appointments by creditors etc

9.—(1) No step may be taken by any person to make an appointment in relation to a relevant provider under paragraph 14 or 22 of Schedule B1 to the 1986 Act (powers of holder of floating charge and of company itself and its directors to appoint administrators) if—

(a) a health special administration order is in force in relation to the relevant provider,

(b) a health special administration order has been made in relation to the relevant provider but is not yet in force, or

(c) an application for such an order is outstanding.

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(2) In the case of a relevant provider to which paragraph (1) does not apply, an appointment in relation to that provider under paragraph 14 or 22 of Schedule B1 to the 1986 Act takes effect only if each of the following conditions is met.

(3) Those conditions are—

- (a) that a copy of every document in relation to that appointment that is filed or lodged with the court in accordance with paragraph 18 or 29 of Schedule B1 to the 1986 Act (documents to be filed or lodged for appointment of administrator) has been served on Monitor,
- (b) that either or both of the following have occurred—
 - (i) Monitor has informed the person who served any such copy that it does not intend to apply for a health special administration order in relation to the relevant provider,
 - (ii) a period of 14 days has elapsed since the service of the last of those copies to be served,
- (c) that there is no outstanding application for a health special administration order in relation to the relevant provider, and
- (d) that the making of an application for such an order has not resulted in the making of a health special administration order which is in force or is still to come into force.

(4) Paragraph 44 of Schedule B1 to the 1986 Act (interim moratorium) does not prevent, or require the permission of the court for, the making of an application for a health special administration order at any time before the appointment takes effect.

(5) In construing references in this regulation to Schedule B1 to the 1986 Act, Schedule 1 to these Regulations is to be ignored.

Restrictions on enforcement of security

10.—(1) A person may not take any step to enforce a security over property of a relevant provider unless—

- (a) notice of the intention to do so has been served on Monitor, and
- (b) either or both of the following have occurred—
 - (i) Monitor has informed the person who served the notice that it does not intend to apply for a health special administration order in relation to the relevant provider,
 - (ii) a period of 14 days has elapsed since the service of the notice.

(2) In the case of a relevant provider which is a non-GB company, the reference in paragraph (1) to the property of the relevant provider is a reference only to its property in Great Britain.

Indemnities

11.—(1) This regulation applies if a health special administration order has been made in relation to a relevant provider.

(2) Monitor may agree to indemnify persons in respect of either or both of the following—

- (a) liabilities incurred in connection with the discharge of functions by the health special administrator, and
- (b) loss or damage sustained in that connection.

(3) The power of Monitor to agree to indemnify persons—

- (a) is confined to a power to agree to indemnify persons in respect of liabilities, loss and damage incurred or sustained by them as relevant persons, but
- (b) includes power to agree to indemnify persons (whether or not they are identified or identifiable at the time of the agreement) who subsequently become relevant persons.

(4) The following are relevant persons for the purposes of this regulation—

- (a) the health special administrator,
- (b) an employee of the health special administrator,
- (c) a partner or employee of a firm of which the health special administrator is a partner,
- (d) a partner or employee of a firm of which the health special administrator is an employee,
- (e) a partner of a firm of which the health special administrator was an employee or partner at a time when the order was in force,

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- (f) a body corporate which is the employer of the health special administrator,
 - (g) an officer, employee or member of such a body corporate, and
 - (h) a Scottish firm which is the employer of the health special administrator or of which the health special administrator is a partner.
- (5) For the purposes of paragraph (4)—
- (a) references to the health special administrator are to be read, where two or more persons are appointed as the health special administrator, as references to any one or more of them, and
 - (b) references to a firm of which a person was a partner or employee at a particular time include a firm which holds itself out to be the successor of a firm of which the person was a partner or employee at that time.
- (6) In this regulation, “Scottish firm” means a firm constituted under the law of Scotland.

Moving from health special administration to administration

12.—(1) This regulation applies if an application to the court is made under paragraph 79 of Schedule B1 to the 1986 Act, as that paragraph has effect by virtue of Schedule 1 to these Regulations, (court ending health special administration) in respect of a company which is subject to a health special administration order.

(2) The health special administrator may, with the consent of Monitor, apply to the court for the making of an administration order under paragraph 10 of Schedule B1 to that Act (as that paragraph has effect otherwise than by virtue of Schedule 1 to these Regulations) appointing a person as the administrator of the company.

(3) The power of the court under sub-paragraph (4) of the paragraph 79 mentioned in paragraph (1) above includes power to make an administration order under the paragraph 10 mentioned in paragraph (2) above appointing a person as the administrator of the company.

(4) If the court exercises its power under paragraph (3) to make such an administration order—

- (a) the court must discharge the health special administration order in respect of the company,
- (b) the court must make provision for such matters as may be prescribed by rules made under section 411 of the 1986 Act by virtue of section 130(9) and (10) of the 2012 Act,
- (c) the court may make other consequential provision,
- (d) the court must specify which of the powers under Schedule B1 to the 1986 Act are to be exercisable by the administrator, and
- (e) that Schedule is to have effect with such modifications as the court may specify.

(5) In construing references in paragraph (4) to Schedule B1 to the 1986 Act, Schedule 1 to these Regulations is to be ignored.

List of relevant providers

13. Monitor must—

- (a) maintain and publish a list of relevant providers, and
- (b) publish a revised version of the list as soon as reasonably practicable after any change is made to it.

Signatory text

Address
Date

Name
Parliamentary Under Secretary of State
Department

SCHEDULES

SCHEDULE 1

Regulation 4

CONDUCT OF HEALTH SPECIAL ADMINISTRATION

PART 1

APPLICATION AND MODIFICATION OF SCHEDULE B1 TO THE 1986 ACT

Introductory

1. Paragraphs 1, 7, 8, 11 to 13, 40 to 50, 54, 57 to 68, 70 to 75, 79, 83 to 91, 98 to 107, 109 to 111 and 112 to 116 of Schedule B1 to the 1986 Act are to have effect in relation to health special administration orders as they have effect in relation to administration orders under that Schedule, but with the modifications set out in this Part of this Schedule.

General modifications of the applicable provisions

2.—(1) Those paragraphs are to have effect as if—

- (a) for “an administration application”, in each place, there were substituted “a health special administration application”,
- (b) for “the administration application”, in each place, there were substituted “the health special administration application”
- (c) for “an administration order”, in each place, there were substituted “a health special administration order”,
- (d) for “the administration order”, in each place, there were substituted “the health special administration order”
- (e) for “an administrator”, in each place, there were substituted “a health special administrator”,
- (f) for “the administrator”, in each place, there were substituted “the health special administrator”,
- (g) for “enters administration”, in each place, there were substituted “enters health special administration”,
- (h) for “in administration”, in each place, there were substituted “in health special administration” and
- (i) for “purpose of administration”, in each place (other than in paragraph 111(1)), there were substituted “objective of the health special administration”.

(2) But sub-paragraph (1) does not apply to any specific modification set out in the following provisions of this Part of this Schedule.

Specific modifications

3. Paragraph 1 (administration) is to have effect as if—

(a) for sub-paragraph (1) there were substituted—

“(1) In this Schedule “health special administrator”, in relation to a company which is a relevant provider, means a person appointed by the court for the purposes of a health special administration order to manage its affairs, business and property.”, and

(b) in sub-paragraph (2), for “Act” there were substituted “Schedule”.

4.—(1) Paragraph 7 (restriction if company in administration) is to have effect as if the following paragraph were substituted for it—

“7. The court has no power to make a health special administration order in relation to a company which is in administration.”

(2) The expression “in administration” in the modified paragraph 7 in sub-paragraph (1) has the meaning given by paragraph 1(2) of Schedule B1 to the 1986 Act, as that Schedule has effect otherwise than by virtue of this Schedule.

5. Paragraph 8 (restriction if company in liquidation) is to have effect as if the following paragraph were substituted for it—

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“8. The court has no power to make a health special administration order in relation to a company which has gone into liquidation.”

6. Paragraph 11 (conditions for making order) is to have effect as if the following paragraph were substituted for it—

“Conditions for making order

11.—(1) The court may make a health special administration order in relation to a company only if it is satisfied—

- (a) that the company is unable, or is likely to become unable, to pay its debts, or
- (b) that, on a petition by the Secretary of State under section 124A, it would be just and equitable (disregarding the objective of the health special administration) to wind up the company in the public interest.

(2) The court may not make a health special administration order on the ground set out in sub-paragraph (1)(b) unless the Secretary of State has certified to the court that the case is one in which the Secretary of State considers (disregarding the objective of the health special administration) that it would be appropriate to petition under section 124A.”

7.—(1) Paragraph 12 (administration application) is to have effect as if the following paragraph were substituted for it—

“Notice of application

12.—(1) If Monitor makes an application for a health special administration order in relation to a company, Monitor must give notice of the application to—

- (a) any person who has appointed an administrative receiver of the company,
- (b) any person who is or may be entitled to appoint an administrative receiver of the company,
- (c) any person who is or may be entitled to make an appointment in relation to the company under paragraph 14, and
- (d) such other persons as may be prescribed.

(2) The notice must be given as soon as reasonably practicable after the making of the application.”

(2) The reference in the modified paragraph 12 in sub-paragraph (1) to paragraph 14 is to be read as a reference to paragraph 14 of Schedule B1 to the 1986 Act, as that Schedule has effect otherwise than by virtue of this Schedule.

8. Paragraph 13 (powers of court) is to have effect as if sub-paragraph (4) were omitted.

9. Paragraph 40 (dismissal of pending winding-up petition) is to have effect as if sub-paragraph (1)(b) (and the word “and” before it), and sub-paragraphs (2) and (3), were omitted.

10. Paragraph 42 (moratorium on insolvency proceedings) is to have effect as if sub-paragraphs (4) and (5) were omitted.

11. Paragraph 43 (moratorium on other legal process) is to have effect as if the following sub-paragraph were inserted after sub-paragraph (6A)—

“(6B) In considering whether to give permission under this paragraph, the court must have regard to the objective of the health special administration.”

12. Paragraph 44 (interim moratorium) is to have effect as if sub-paragraphs (2) to (4), (6) and (7)(a) to (c) were omitted.

13. Paragraph 46(6) (date for notifying administrator’s appointment) is to have effect as if for paragraphs (a) to (c) there were substituted “the date on which the health special administration order comes into force”.

14. Paragraph 49 (administrator’s proposals) is to have effect as if the following were substituted for it—

“Health special administrator’s proposals

49.—(1) The health special administrator of a company shall make a statement setting out proposals for achieving the objective of the health special administration (but this is subject to paragraph 49A).

(2) A statement under sub-paragraph (1) must, in particular—

- (a) deal with such matters as may be prescribed, and

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- (b) where applicable, explain why the health special administrator thinks that the objective of the health special administration should be achieved by means other than just a rescue of the company as a going concern.
- (3) Proposals under this paragraph may include—
- (a) a proposal for a voluntary arrangement under Part 1 of this Act (although this paragraph is without prejudice to section 4(3)), or
 - (b) a proposal for a compromise or arrangement to be sanctioned under Part 26 of the Companies Act 2006 (arrangements and reconstructions).
- (4) The health special administrator shall send a copy of the statement of the proposals—
- (a) to the registrar of companies,
 - (b) to every creditor of the company of whose claim and address the health special administrator is aware,
 - (c) to every member of the company of whose address the health special administrator is aware, and
 - (d) to such other persons as may be prescribed.
- (5) If paragraph 49B does not apply, the health special administrator shall publish in the prescribed manner a report containing prescribed details of such of the proposals included in the statement under sub-paragraph (1) as may be prescribed.
- (6) The health special administrator shall comply with sub-paragraph (4) and (if applicable) sub-paragraph (5)—
- (a) as soon as is reasonably practicable after the company enters health special administration, and
 - (b) in any event, before the end of the period of eight weeks beginning with the day on which the company enters health special administration.
- (7) The health special administrator shall be taken to comply with sub-paragraph (4)(c) if the health special administrator publishes in the prescribed manner a notice undertaking to provide a copy of the statement of proposals free of charge to any member of the company who applies in writing to a specified address.
- (8) A health special administrator commits an offence if the health special administrator fails without reasonable excuse to comply with sub-paragraph (6).
- (9) A period specified in this paragraph may be varied—
- (a) by notice given by Monitor to the health special administrator which specifies the varied period, or
 - (b) in accordance with paragraph 107.
- (10) A period may be extended under sub-paragraph (9)(a)—
- (a) more than once, and
 - (b) after expiry.

Prior approval of statement etc

49A.—(1) The health special administrator may not make a statement under paragraph 49(1) unless a determination has been made of the health care services to which the objective set out in section 129(1) of the 2012 Act is to apply.

(2) Before making the statement under paragraph 49(1), the health special administrator must obtain the consent of—

- (a) all of the commissioners, and
- (b) Monitor,

to the proposals included in the statement.

(3) If the health special administrator does not obtain the consent of one or more of the commissioners (other than the Board), the requirement in sub-paragraph (2) is to be treated as met if the health special administrator obtains the consent of the Board.

(4) If the health special administrator is not able to make the statement under paragraph 49(1) because of a failure to obtain any consent required by this paragraph, the health special administrator may apply to the court for directions.

(5) Those directions may, in particular—

- (a) make provision as to the proposals to be included in the statement, and

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(b) treat any requirement under this paragraph to obtain consent as having been met if the proposals included in the statement comply with the directions.

(6) Nothing in sub-paragraphs (4) and (5) limits paragraph 63.

(7) In this Schedule “the commissioners” means the commissioners of the health care services provided for the purposes of the NHS by the company.

(8) In sub-paragraph (7) “commissioner”, in relation to a health care service, means the person who arranges for the provision of the service.

Public consultation on proposals contained in statement

49B.—(1) This paragraph applies if the implementation of the proposals included in the statement under paragraph 49(1) would involve a significant variation in the health care services which are provided as part of the NHS.

(2) The health special administrator shall, within the prescribed period, publish in the prescribed manner a report containing prescribed details of such of the proposals included in the statement under paragraph 49(1) as may be prescribed.

(3) At the same time as publishing the report, the health special administrator must publish in the prescribed manner a notice—

(a) which states that the health special administrator is seeking comments on such matters in the report as may be prescribed, and

(b) which describes how comments can be made (including details of how comments can be given in writing).

(4) The notice must specify a period of 6 weeks within which the health special administrator seeks comment (the “consultation period”).

(5) The first day of the consultation period must be within the period of 5 business days beginning with the day on which the report is published.

(6) The health special administrator—

(a) must, within the period of 14 days after the end of the consultation period, consider, and publish in the prescribed manner the health special administrator’s responses to, any comments made, and

(b) may, as a result of any comments made, revise the proposals.”

15. Paragraph 54 (revision of administrator’s proposals) is to have effect as if the following were substituted for it—

“Revision of health special administrator’s proposals

54.—(1) The health special administrator of a company—

(a) may on one or more occasions, and

(b) whether or not as a result of any comments made under paragraph 49B,

revise the proposals included in the statement made under paragraph 49(1) in relation to the company (but this is subject to paragraph 54A).

(2) Sub-paragraphs (3) and (4) apply—

(a) if the health special administrator thinks that a revision is substantial, or

(b) where paragraph 49B applies, if any revision is made.

(3) The health special administrator shall send a copy of the revised proposals—

(a) to the registrar of companies,

(b) to every creditor of the company of whose claim and address the health special administrator is aware,

(c) to every member of the company of whose address the health special administrator is aware, and

(d) to such other persons as may be prescribed.

(4) The health special administrator shall, within the prescribed period, publish in the prescribed manner a report containing prescribed details of such of the revised proposals as may be prescribed.

(5) A copy sent in accordance with sub-paragraph (3) must be sent within the prescribed period.

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(6) The health special administrator is to be taken to have complied with sub-paragraph (3)(c) if the health special administrator publishes, in the prescribed manner, a notice undertaking to provide a copy of the revised proposals free of charge to any member of the company who applies in writing to a specified address.

(7) The health special administrator commits an offence if the health special administrator fails without reasonable excuse to comply with this paragraph.

Prior approval of revisions to proposals

54A.—(1) This paragraph applies—

- (a) if the health special administrator thinks that a proposed revision under paragraph 54 is substantial, or
- (b) where paragraph 49B applies, if a proposed revision under paragraph 54 relates to the health care services which are determined to be services to which the objective set out in section 129(1) of the 2012 Act is to apply.

(2) The health special administrator must obtain the consent of—

- (a) all of the commissioners, and
- (b) Monitor,

before making the proposed revision.

(3) If the health special administrator does not obtain the consent of one or more of the commissioners (other than the Board), the requirement in sub-paragraph (2) is to be treated as met if the health special administrator obtains the consent of the Board.

(4) If the health special administrator is not able to revise proposals under paragraph 54 because of a failure to obtain any consent required by this paragraph, the health special administrator may apply to the court for directions.

(5) Those directions may, in particular—

- (a) make provision as to the revisions to be made, and
- (b) treat any requirement under this paragraph to obtain consent as having been met if the revisions made comply with the directions.

(6) Nothing in sub-paragraphs (4) and (5) limits paragraph 63.”

16. Paragraph 57 (creditors’ committee) is to have effect as if the following were substituted for it—

“Assistance of Monitor

57.—(1) Monitor shall assist the health special administrator in discharging the health special administrator’s functions.

(2) For that purpose Monitor shall have the power conferred by sub-paragraph (3) and such other functions as may be conferred on it by or under this Act.

(3) Monitor may require the health special administrator—

- (a) to attend at any reasonable time and place of which the health special administrator is given at least seven days’ notice, and
- (b) to provide Monitor with information about the exercise of the health special administrator’s functions.”

17. Paragraph 60 (powers of an administrator) is to have effect as if the existing text were to become sub-paragraph (1) and as if after that sub-paragraph there were inserted—

“(2) The health special administrator of a company has the power to act on behalf of the company for the purposes of any enactment which confers a power on the company or imposes a duty on it.

(3) In sub-paragraph (2) “enactment” includes—

- (a) an enactment contained in subordinate legislation, within the meaning of the Interpretation Act 1978,
- (b) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament, and
- (c) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales.”

18. Paragraph 63 (application for directions) is to have effect as if the existing text were to become sub-paragraph (1) and as if after that sub-paragraph there were inserted—

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“(2) Before giving directions under this paragraph, the court must give Monitor a reasonable opportunity of making representations about the proposed directions.”

19. Paragraph 68 (management duties of an administrator) is to have effect as if—

(a) in sub-paragraph (1), for paragraphs (a) to (c) there were substituted—

“the proposals as—

(a) set out in the statement made under paragraph 49 in relation to the company, and

(b) from time to time revised under paragraph 54,

for achieving the objective of the health special administration.”,

(b) in sub-paragraph (3), for paragraphs (a) to (d) there were substituted “the directions are consistent with the achievement of the objective of the health special administration”, and

(c) after that sub-paragraph there were inserted—

“(4) Before giving directions under sub-paragraph (2), the court must give Monitor a reasonable opportunity of making representations about the proposed directions.”

20. Paragraph 71 (charged property: non-floating charge) is to have effect as if—

(a) in sub-paragraph (3)(b), for “market” there were substituted “the appropriate”, and

(b) in sub-paragraph (5), for the words from “the registrar” to the end there were substituted—

“(a) the registrar of companies, and

(b) such other persons as may be prescribed,

before the end of the period of 14 days starting with the date of the order.”

21. Paragraph 72 (hire-purchase property) is to have effect as if—

(a) in sub-paragraph (3)(b), for “market” there were substituted “the appropriate”, and

(b) in sub-paragraph (4), for the words from “the registrar” to the end there were substituted—

“(a) the registrar of companies, and

(b) such other persons as may be prescribed,

before the end of the period of 14 days starting with the date of the order.”

22. Paragraph 73(3) (protection for secured or preferential creditor) is to have effect as if for “or modified” there were substituted “under paragraph 54”.

23. Paragraph 74 (challenge to administrator's conduct) is to have effect as if—

(a) for sub-paragraph (2) there were substituted—

“(2) If a company is in health special administration, a person mentioned in sub-paragraph (2A) may apply to the court claiming that the health special administrator is acting in a manner preventing the achievement of the objective of the health special administration as quickly and efficiently as is reasonably practicable.

(2A) The persons who may apply to the court are—

(a) Monitor,

(b) a creditor or member of the company.”,

(b) in sub-paragraph (6)—

(i) at the end of paragraph (b) there were inserted “or”, and

(ii) paragraph (c) (and the word “or” before it) were omitted, and

(c) after that sub-paragraph there were inserted—

“(7) In the case of a claim made otherwise than by the Monitor, the court may grant a remedy or relief or make an order under this paragraph only if it has given Monitor a reasonable opportunity of making representations about the claim and the proposed remedy, relief or order.

(8) The court may grant a remedy or relief or make an order on an application under this paragraph only if it is satisfied, in relation to the matters that are the subject of the application, that the health special administrator—

(a) is acting,

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- (b) has acted, or
- (c) is proposing to act,

in a way that is inconsistent with the achievement of the objective of the health special administration as quickly and as efficiently as is reasonably practicable.

(9) Before the making of an order of the kind mentioned in sub-paragraph (4)(d)—

- (a) the court must notify the health special administrator of the proposed order and of a period during which the health special administrator is to have the opportunity of taking steps falling within sub-paragraphs (10) to (12), and
- (b) the period notified must have expired without the taking of such of those steps as the court thinks should have been taken,

and that period must be a reasonable period.

(10) In the case of a claim under sub-paragraph (1)(a), the steps referred to in sub-paragraph (9) are—

- (a) ceasing to act in a manner that unfairly harms the interests to which the claim relates,
- (b) remedying any harm unfairly caused to those interests, and
- (c) steps for ensuring that there is no repetition of conduct unfairly causing harm to those interests.

(11) In the case of a claim under sub-paragraph (1)(b), the steps referred to in sub-paragraph (9) are steps for ensuring that the interests to which the claim relates are not unfairly harmed.

(12) In the case of a claim under sub-paragraph (2), the steps referred to in sub-paragraph (9) are—

- (a) ceasing to act in a manner preventing the achievement of the objective of the health special administration as quickly and as efficiently as is reasonably practicable,
- (b) remedying the consequences of the health special administrator having acted in such a manner, and
- (c) steps for ensuring that there is no repetition of conduct preventing the achievement of the objective of the health special administration as quickly and as efficiently as is reasonably practicable.”

24. Paragraph 75(2) (misfeasance) is to have effect as if after paragraph (b) there were inserted—

- “(ba) a person appointed as an administrator of the company under the provisions of this Act, as they have effect in relation to administrators other than health special administrators,
- (bb) Monitor.”.

25. Paragraph 79 (end of administration) is to have effect as if—

- (a) for the heading there were substituted “*Court ending health special administration*”,
- (b) for paragraphs (1) and (2) there were substituted—

“(1) On an application under sub-paragraph (2) or (2A), the court may provide for the appointment of a health special administrator of a company to cease to have effect from a specified time.

(2) An application may be made to the court under this sub-paragraph by the health special administrator if the health special administrator considers that the objective of the health special administration cannot be, or no longer needs to be, achieved.

(2A) An application may be made to the court under this sub-paragraph—

- (a) by Monitor, or
- (b) by the health special administrator,

if Monitor or the health special administrator (as the case may be) considers that the objective of the health special administration has been sufficiently achieved.

(2B) An application by the health special administrator under sub-paragraph (2A) may not be made without the consent of Monitor.”, and

- (c) sub-paragraph (3) were omitted.

26. Paragraph 83 (notice to registrar when moving to voluntary liquidation) is to have effect as if—

- (a) in sub-paragraph (3), after “may” there were inserted “, with the consent of Monitor.”, and
- (b) in sub-paragraph (8)—
 - (i) at the end of paragraph (d) there were inserted “and”, and

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(ii) paragraph (f) (and the word “and” before it) were omitted.

27. Paragraph 84 (notice to registrar when moving to dissolution) is to have effect as if—

- (a) in sub-paragraph (1), for “to the registrar of companies” there were substituted—
 - “(a) to Monitor, and
 - (b) if directed to do so by Monitor, to the registrar of companies.”,
- (b) sub-paragraph (2) were omitted,
- (c) in sub-paragraphs (3) to (6), for “(1)”, in each place, there were substituted “(1)(b), and
- (d) in sub-paragraph (8), after “companies” there were inserted “and Monitor”.

28. Paragraph 85(1) (discharge of administration order where administration ends) is to have effect as if paragraph (b) (and the word “and” before it) were omitted.

29. Paragraph 86(2) (notice to registrar of companies where administration ends) is to have effect as if for the words from “the registrar of companies” to the end there were substituted—

- “(a) the registrar of companies, and
 - (b) such other persons as may be prescribed,
- within the period of 14 days beginning with the date of the order.”.

30. Paragraph 87(2) (resignation of administrator) is to have effect as if for paragraphs (a) to (d) there were substituted “by notice in writing to the court”.

31. Paragraph 89(2) (administrator ceasing to be qualified) is to have effect as if for paragraphs (a) to (d) there were substituted “to the court”.

32. Paragraph 90 (filling vacancy in office of administrator) is to have effect as if for “Paragraphs 91 to 95 apply” there were substituted “Paragraph 91 applies”.

33. Paragraph 91 (vacancies in court appointments) is to have effect as if—

- (a) for sub-paragraph (1) there were substituted—
 - “(1) The court may replace the health special administrator on an application made—
 - (a) by Monitor, or
 - (b) where more than one person was appointed to act jointly or concurrently as the health special administrator, by any of those persons who remains in office.”, and
- (b) sub-paragraph (2) were omitted.

34. Paragraph 98 (discharge from liability on vacation of office) is to have effect as if sub-paragraphs (2)(b) and (3) were omitted.

35. Paragraph 99 (charges and liabilities upon vacation of office by administrator) is to have effect as if—

- (a) in sub-paragraph (4), for the words from the beginning to “cessation”, in the first place, there were substituted “A sum falling within sub-paragraph (4A)”,
- (b) after that sub-paragraph there were inserted—
 - “(4A) A sum falls within this sub-paragraph if it is a sum payable in respect of a debt or other liability arising out of a contract that was entered into before cessation by the former health special administrator or a predecessor.”, and
- (c) in sub-paragraph (5), for “(4)” there were substituted “(4A)”.

36. Paragraph 100 (joint and concurrent administrators) is to have effect as if for sub-paragraph (2) there were substituted—

- “(2) If the court appoints two or more persons as the health special administrator of a company, the appointment must set out—
 - (a) which (if any) of the functions of a health special administrator are to be exercisable only by the appointees acting jointly,
 - (b) the circumstances (if any) in which functions of a health special administrator are to be exercisable by one of the appointees, or by particular appointees, acting alone, and

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- (c) the circumstances (if any) in which things done in relation to one of the appointees, or in relation to particular appointees, are to be treated as done in relation to all of them.”

37. Paragraph 101(3) (joint administrators) is to have effect as if after "87 to" there were inserted "91, 98 and".

38. Paragraph 103 (appointment of additional administrators) is to have effect as if—

- (a) in sub-paragraph (2), the words from the beginning to "order" were omitted and for paragraph (a) there were substituted—

“(a) Monitor, or”, and

- (b) sub-paragraphs (3) to (5) were omitted.

39. Paragraph 106(2) (penalties) is to have effect as if paragraphs (a), (b), (f), (g), (i) and (l) to (n) were omitted.

40. Paragraph 109 (references to extended periods) is to have effect as if "or 108" were omitted.

41. Paragraph 111 (interpretation) is to have effect as if—

- (a) in sub-paragraph (1), the definitions of “holder of a qualifying floating charge”, “market value” and “the purpose of administration” were omitted,

- (b) in that sub-paragraph, after the definition of “administrator” (as modified as a result of paragraph 2 above) there were inserted—

““appropriate value” means the best price which would be reasonably available on a sale which is consistent with the achievement of the objective of the health special administration,

“the Board” means the National Health Service Commissioning Board,”

- (c) in that sub-paragraph, before the definition of "creditors' meeting" there were inserted—

““the commissioners” has the meaning given by paragraph 49A(7),

“company” and “court” have the same meaning as in Chapter 5 of Part 3 of the Health and Social Care Act 2012,”

- (d) in that sub-paragraph, after the definition of “floating charge” there were inserted—

““health care services” has the meaning given by section 64(3) of the Health and Social Care Act 2012,

“health special administration application” means an application to the court for a health special administration order under section 128 of the Health and Social Care Act 2012,

“health special administration order” has the same meaning as in Chapter 5 of Part 3 of the Health and Social Care Act 2012,”

- (e) in that sub-paragraph, after the definition of "hire purchase agreement" there were inserted—

““the NHS” has the meaning given by section 64(4) of the Health and Social Care Act 2012,

“objective”, in relation to a health special administration, is to be read in accordance with section 129 of the Health and Social Care Act 2012,

“prescribed” means prescribed by rules,

“relevant provider” has the same meaning as in Chapter 5 of Part 3 of the Health and Social Care Act 2012,

“rules” means rules made under section 411 by virtue of sections 130(9) and (10) of the Health and Social Care Act 2012.”

- (f) sub-paragraphs (1A) and (1B) were omitted, and

- (g) after sub-paragraph (3) there were inserted—

“(4) For the purposes of this Schedule a reference to a health special administration order includes a reference to an appointment under paragraph 91 or 103.”

PART 2

FURTHER SCHEDULE B1 MODIFICATIONS FOR NON-GB COMPANIES

Introductory

42.—(1) This Part of this Schedule applies in the case of a health special administration order applying to a non-GB company.

(2) The provisions of Schedule B1 to the 1986 Act mentioned in paragraph 1 above (as modified by Part 1 of this Schedule) have effect in relation to the company with the further modifications set out in this Part of this Schedule.

43. In paragraphs 44 to 51—

- (a) the provisions of Schedule B1 to the 1986 Act that are mentioned in paragraph 1 above are referred to as the applicable provisions, and
- (b) references to those provisions, or to provisions comprised in them, are references to those provisions as modified by Part 1 of this Schedule.

Modifications

44. In the case of a non-GB company—

- (a) paragraphs 83 and 84 of Schedule B1 to the 1986 Act do not apply,
- (b) paragraphs 46(4), 49(4)(a), 54(3)(a), 71(5)(a), 72(4)(a) and 86(2)(a) of that Schedule apply only if the company is subject to a requirement imposed by regulations under section 1043 or 1046 of the Companies Act 2006⁽⁶⁴⁾ (unregistered UK companies or overseas companies), and
- (c) paragraph 61 of that Schedule does not apply.

45.—(1) The applicable provisions and Schedule 1 to the 1986 Act (as applied by paragraph 60(1) of Schedule B1 to that Act) are to be read by reference to the limitation imposed on the scope of the health special administration order in question as a result of section 128(7) of the 2012 Act.

(2) Sub-paragraph (1) has effect, in particular, so that—

- (a) a power conferred, or duty imposed, on the health special administrator by or under the applicable provisions or Schedule 1 to the 1986 Act is to be read as being conferred or imposed only in relation to the affairs and business of the company so far as carried on in Great Britain and to its property in Great Britain,
- (b) references to the company's affairs, business or property are to be read as references to affairs or business so far as carried on in Great Britain or to its property in Great Britain,
- (c) references to goods in the company's possession are to be read as references to goods in its possession in Great Britain,
- (d) references to premises let to the company are to be read as references to premises let to it in Great Britain, and
- (e) references to legal process instituted or continued against the company or its property are to be read as references to such legal process relating to the affairs or business so far as carried on in Great Britain or to its property in Great Britain.

46. Paragraph 12(1) of Schedule B1 to the 1986 Act (notice of application) is to have effect as if—

- (a) in paragraph (a), for “an administrative receiver of the company” there were substituted “a person to perform functions which—
 - (i) are equivalent to those of an administrative receiver of the company, and
 - (ii) relate only to the affairs and business of the company so far as carried on in Great Britain and to its property in Great Britain”, and
- (b) in paragraph (b), for “an administrative receiver of the company” there were substituted “a person to perform functions which—
 - (i) are equivalent to those of an administrative receiver of the company, and
 - (ii) relate only to the affairs and business of the company so far as carried on in Great Britain and to its property in Great Britain”.

⁽⁶⁴⁾ 2006 c. 46.

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47. Paragraph 13 of Schedule B1 to the 1986 Act (powers of court) is to have effect as if the following were inserted after sub-paragraph (3)—

“(3A) The reference in sub-paragraph (3)(a) to restricting the exercise of a power of the company or of its directors is a reference only to restricting the exercise of such a power—

- (a) within Great Britain, or
- (b) in relation to the company’s affairs or business so far as carried on in Great Britain, or to its property in Great Britain.”

48. Paragraph 41 of Schedule B1 to the 1986 Act (dismissal of receivers) is to have effect as if—

- (a) for sub-paragraph (1) there were substituted—

“(1) Where a health special administration order takes effect in respect of a company—

- (a) a person appointed to perform functions equivalent to those of an administrative receiver, and
- (b) if the health special administrator so requires, a person appointed to perform functions equivalent to those of a receiver,

must refrain, during the period specified in sub-paragraph (1A), from performing those functions in Great Britain or in relation to any of the company’s property in Great Britain.

(1A) That period is—

- (a) in the case of a person mentioned in sub-paragraph (1)(a), the period while the company is in health special administration, and
- (b) in the case of a person mentioned in sub-paragraph (1)(b), during so much of that period as is after the date on which the person is required by the health special administrator to refrain from performing functions.”, and

- (b) sub-paragraphs (2) to (4) were omitted.

49. Paragraph 43(6A) of Schedule B1 to the 1986 Act (moratorium on appointment to receiverships) is to have effect as if for "An administrative receiver" there were substituted "A person with functions equivalent to those of an administrative receiver".

50. Paragraph 44(7) of Schedule B1 to the 1986 Act (proceedings to which interim moratorium does not apply) is to have effect as if for paragraph (d) there were substituted—

“(d) the carrying out of functions by a person who (whenever appointed) has functions equivalent to those of an administrative receiver of the company.”

51. Paragraph 64 of Schedule B1 to the 1986 Act (general powers of administrator) is to have effect as if—

- (a) in sub-paragraph (1), after "power" there were inserted "in relation to the affairs or business of the company so far as carried on in Great Britain or to its property in Great Britain", and
- (b) in sub-paragraph (2)(b), after "instrument" there were inserted "or by the law of the place where the company is incorporated”.

PART 3

OTHER MODIFICATIONS

General modifications

52.—(1) References within sub-paragraph (2) which are contained—

- (a) in the 1986 Act (other than Schedule B1 to that Act), or
- (b) in other enactments passed or made before the day on which these Regulations were made,

include references to whatever corresponds to them for the purposes of this paragraph.

(2) The references are those (however expressed) which are or include references to—

- (a) an administrator appointed by an administration order,
- (b) an administration order,

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- (c) an application for an administration order,
 - (d) a company in administration,
 - (e) entering into administration, and
 - (f) Schedule B1 to the 1986 Act or a provision of that Schedule.
- (3) For the purposes of this paragraph—
- (a) a health special administrator corresponds to an administrator appointed by an administration order,
 - (b) a health special administration order corresponds to an administration order,
 - (c) an application for a health special administration order corresponds to an application for an administration order,
 - (d) a company in health special administration corresponds to a company in administration,
 - (e) entering into health special administration corresponds to entering into administration, and
 - (f) what corresponds to Schedule B1 to the 1986 Act or a provision of that Schedule is that Schedule or that provision as it has effect by virtue of Parts 1 and 2 of this Schedule.

53.—(1) Paragraph 52, in its application to section 1(3) of the 1986 Act, does not entitle the health special administrator of an unregistered company to make a proposal under Part 1 of the 1986 Act (company voluntary arrangements).

(2) Paragraph 52 does not confer any right under section 7(4) of the 1986 Act (implementation of voluntary arrangements) for a supervisor of voluntary arrangements to apply for a health special administration order in relation to a company which is a relevant provider.

(3) Paragraph 52 does not apply to section 359 of the Financial Services and Markets Act 2000⁽⁶⁵⁾ (administration applications by FSA).

Modifications of 1986 Act

54. The following provisions of the 1986 Act are to have effect in the case of any health special administration with the following modifications.

55. Section 5 (effect of approval of voluntary arrangements) is to have effect as if after subsection (4) there were inserted—

“(4A) Where the company is in health special administration, the court must not make an order or give a direction under subsection (3) unless—

- (a) the court has given Monitor a reasonable opportunity of making representations to it about the proposed order or direction, and
- (b) the order or direction is consistent with the objective of the health special administration.

(4AA) In subsection (4A) "in health special administration" and "objective of the health special administration" are to be read in accordance with Schedule B1 to this Act, as that Schedule has effect by virtue of Parts 1 and 2 of Schedule 1 to the Health Special Administration Regulations 2013.”

56. Section 6 (challenge of decisions in relation to voluntary arrangements) is to have effect as if—

- (a) in subsection (2), for "this section" there were substituted "subsection (1)",
- (b) after that subsection there were inserted—

“(2AA) Subject to this section, where a voluntary arrangement in relation to a company in health special administration is approved at the meetings summoned under section 3, an application to the court may be made by Monitor on the ground that the voluntary arrangement is not consistent with the achievement of the objective of the health special administration.”,

- (c) in subsection (4), after "subsection (1)" there were inserted "or, in the case of an application under subsection (2AA), as to the ground mentioned in that subsection", and
- (d) after subsection (7) there were inserted—

⁽⁶⁵⁾ 2000 c. 8.

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“(7A) In this section "in health special administration" and "objective of the health special administration" are to be read in accordance with Schedule B1 to this Act, as that Schedule has effect by virtue of Parts 1 and 2 of Schedule 1 to the Health Special Administration Regulations 2013.”

57. Schedule 10 (punishment of offences under 1986 Act) is to have effect as if, in the first column, for “Sch. B1, para 49(7).” there were substituted “Sch. B1, para. 49(8).”.

Interpretation

58. In this Part of this Schedule—

"administration order", "administrator", "enters administration" and "in administration" are to be read in accordance with Schedule B1 to the 1986 Act (disregarding Parts 1 and 2 of this Schedule), and

"enters health special administration" and "in health special administration" are to be read in accordance with Schedule B1 to the 1986 Act (as that Schedule has effect by virtue of Parts 1 and 2 of this Schedule).

SCHEDULE 2

Regulation 5

TRANSFER SCHEMES

Application of Schedule

59. This Schedule applies if—

- (a) the court has made a health special administration order in relation to a relevant provider (the "old provider"), and
- (b) it is proposed that a transfer falling within section 129(3) of the 2012 Act (transfer as going concern of undertaking or part of undertaking) be made to another person (or persons) (a "new provider").

60. While the order is in force, the health special administrator is to act on behalf of the old provider in doing anything that it is authorised or required to do by or under this Schedule.

Making of HSA transfer schemes

61.—(1) The old provider may for the purpose of giving effect to the proposed transfer make a scheme (an "HSA transfer scheme") for the transfer of property, rights and liabilities from it to the new provider (or providers).

(2) An HSA transfer scheme has effect only if—

- (a) the new provider (or providers) have consented to the making of the scheme, and
- (b) Monitor has approved the scheme.

(3) An HSA transfer scheme may be made only at a time when the health special administration order is in force in relation to the old provider.

(4) An HSA transfer scheme takes effect at the time specified in the scheme.

(5) In the case of a proposed transfer falling within section 129(4)(a) of the 2012 Act (transfer to wholly-owned subsidiary), sub-paragraph (2)(a) does not apply.

Approval and modification by Monitor

62.—(1) Monitor may modify an HSA transfer scheme before approving it.

(2) After an HSA transfer scheme has taken effect—

- (a) Monitor may by notice to the old provider and the new provider (or providers) modify the scheme, and
- (b) those modifications are to be treated as taking effect, or having taken effect, at the time specified in the notice.

(3) The time specified in a notice under paragraph (2) may be the time specified under paragraph 3(4) or any later time.

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- (4) The only modifications that may be made by Monitor under this paragraph are ones—
- (a) to which the old provider and the new provider (or providers) have consented, or
 - (b) in the case of a proposed transfer falling within section 129(4)(a) of the 2012 Act, to which the old provider has consented.
- (5) In connection with giving effect to modifications under sub-paragraph (2), Monitor may make incidental, supplementary, consequential, transitional, transitory or saving provision (and different provision may be made for different cases or circumstances).
- (6) In deciding whether to approve or modify an HSA transfer scheme, Monitor must have regard, in particular, to—
- (a) the interests of persons in their capacity as patients, and
 - (b) any effect the scheme or modification is likely to have on the interests of persons other than the old provider, a new provider or persons in their capacity as patients.
- (7) In sub-paragraph (6) “patients” means persons to whom health care services are or may be provided as part of the NHS.
- (8) The old provider and the new provider (or providers) each have a duty to provide Monitor with any information or other assistance that Monitor may reasonably require for the purposes of, or in connection with, the exercise of any power under this paragraph.
- (9) That duty overrides a contractual or other requirement to keep information in confidence.
- (10) That duty is enforceable in civil proceedings by Monitor—
- (a) for an injunction,
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988⁽⁶⁶⁾, or
 - (c) for any other appropriate remedy or relief.

Identification of property etc to be transferred

63.—(1) An HSA transfer scheme may identify the property, rights and liabilities to be transferred by specifying or describing them.

(2) An HSA transfer scheme may provide for the way in which property, rights or liabilities of any description are to be identified.

Property, rights and liabilities that may be transferred

- 64.**—(1) An HSA transfer scheme may transfer—
- (a) property situated in any part of the world, and
 - (b) rights and liabilities arising (in any way) under the law of any country or territory.
- (2) The property, rights and liabilities that may be transferred by an HSA transfer scheme include—
- (a) property, rights and liabilities acquired or arising after the scheme has been made but before the time at which it takes effect,
 - (b) rights and liabilities arising after that time in respect of matters occurring before that time, and
 - (c) property, rights and liabilities that would not otherwise be capable of being transferred or assigned.
- (3) The transfers to which effect may be given by an HSA transfer scheme include ones that are to take effect as if there were no such contravention, liability or interference with any interest or right as there would otherwise be by reason of any provision having effect in relation to the terms on which the old provider is entitled or subject to anything to which the transfer relates.
- (4) In sub-paragraph (3) the reference to any provision is a reference to any provision, whether under an enactment or agreement or otherwise.
- (5) Sub-paragraph (3) has effect where shares in a subsidiary of the old provider are transferred as if the reference to the terms on which that provider is entitled or subject to anything to which the transfer relates included a reference to the terms on which the subsidiary is entitled or subject to anything immediately before the transfer takes effect.

⁽⁶⁶⁾ 1988 c. 36.

Dividing and modifying the old provider's property, rights and liabilities

65.—(1) An HSA transfer scheme may contain provision—

- (a) for the creation, in favour of the old provider or a new provider, of an interest or right in or in relation to property or rights transferred in accordance with the scheme,
- (b) for giving effect to a transfer by the creation, in favour of a new provider, of an interest or right in or in relation to property or rights retained by the old provider, and
- (c) for the creation of new rights and liabilities (including rights of indemnity and duties to indemnify) as between the old provider and a new provider.

(2) An HSA transfer scheme may contain provision for the creation of rights and liabilities for the purpose of converting arrangements between different parts of the old provider's undertaking into a contract—

- (a) between different new providers, or
- (b) between a new provider and the old provider.

(3) An HSA transfer scheme may contain provision—

- (a) for rights and liabilities to be transferred so as to be enforceable by or against more than one new provider or by or against both the new provider and the old provider, and
- (b) for rights and liabilities enforceable against more than one person in accordance with provision falling within paragraph (a) to be enforceable in different or modified respects by or against each or any of them.

(4) An HSA scheme may, for the purpose of giving effect—

- (a) to any property, rights or liabilities to be transferred in accordance with the scheme, or
- (b) to any interests, rights or liabilities to be created in accordance with the scheme,

contain provision for interests, rights or liabilities of third parties to be modified in the manner set out in the scheme.

(5) The reference in sub-paragraph (4) to third parties is to persons other than the old provider and a new provider.

(6) Paragraph 6(2)(c) and (3) apply to the creation of interests and rights as they apply to the transfer of interests and rights.

Transfer etc of statutory functions

66.—(1) An HSA transfer scheme may contain provision—

- (a) for the transfer of relevant statutory functions to a new provider, or
- (b) for relevant statutory functions to be exercisable concurrently by the old provider and a new provider (or providers).

(2) For this purpose "relevant statutory functions" means powers and duties conferred or imposed on the old provider by or under an enactment so far as they are connected with—

- (a) the undertaking of the old provider to which the HSA transfer scheme relates, or
- (b) property, rights or liabilities transferred in accordance with the scheme.

(3) Provision within sub-paragraph (1) may apply to relevant statutory functions so far as exercisable in an area specified or described in the provision.

Effect of health transfer scheme: general

67.—(1) At the time at which an HSA transfer scheme takes effect—

- (a) the property, rights and liabilities to be transferred in accordance with the scheme, and
- (b) the interests, rights and liabilities to be created in accordance with the scheme,

are, as a result of this paragraph, to vest in the appropriate person (but this is subject to sub-paragraph (2)).

(2) If modifications under paragraph 4(2) provide for the transfer or creation of property, rights and liabilities, and those modifications take effect at a time later than the time at which the HSA transfer scheme takes effect, those property, rights and liabilities are, as a result of this paragraph, to vest in the appropriate person at that later time.

(3) In this paragraph "the appropriate person" means—

- (a) in the case of property, rights and liabilities to be transferred, the new provider (or providers), and

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- (b) in the case of interests, right and liabilities to be created, the person in whose favour, or in relation to whom, they are to be created.

Effect of health transfer scheme on right to terminate or modify interest etc

68.—(1) This paragraph applies if a person would otherwise be entitled, in consequence of anything done or likely to be done by or under this Act in connection with an HSA transfer scheme—

- (a) to terminate, modify, acquire or claim an interest or right, or
- (b) to treat an interest or right as modified or terminated.

(2) The entitlement—

- (a) is not enforceable in relation to the interest or right until after the transfer of the interest or right by the scheme, and
- (b) after that transfer, is enforceable in relation to the interest or right only in so far as the scheme contains provision for the interest or right to be transferred subject to whatever confers the entitlement.

(3) If shares in a subsidiary of the old provider are transferred, sub-paragraph (2) has effect in relation to an interest or right of the subsidiary as if the references to the transfer of the interest or right included a reference to the transfer of the shares.

Supplementary provisions of HSA transfer schemes

69.—(1) An HSA transfer scheme may—

- (a) contain incidental, supplementary, consequential, transitional, transitory or saving provision, and
- (b) make different provision for different cases or circumstances.

(2) Nothing in paragraphs 12 to 15 limits sub-paragraph (1).

(3) In those paragraphs any reference to a transfer in accordance with an HSA transfer scheme includes the creation in accordance with an HSA transfer scheme of an interest, right or liability.

70.—(1) An HSA transfer scheme may provide, in relation to transfers in accordance with the scheme—

- (a) for a new provider to be treated as the same person in law as the old provider,
- (b) for agreements made, transactions effected or other things done by or in relation to the old provider to be treated, so far as may be necessary for the purposes of or in connection with the transfers, as made, effected or done by or in relation to a new provider,
- (c) for references in any document to the old provider, or to an employee or office holder of it, to have effect, so far as may be necessary for the purposes of or in connection with any of the transfers, with such modifications as are specified in the scheme, and
- (d) for proceedings commenced by or against the old provider to be continued by or against a new provider.

(2) In sub-paragraph (1)(c) "document" includes an agreement or instrument, but does not include an enactment.

71.—(1) An HSA transfer scheme may contain provision about—

- (a) the transfer of foreign property, rights and liabilities, and
- (b) the creation of foreign rights, interests and liabilities.

(2) For this purpose property, or a right, interest or liability, is "foreign" if an issue relating to it arising in any proceedings would (in accordance with the rules of private international law) be determined under the law of a country or territory outside Great Britain.

72. An HSA transfer scheme may make provision for disputes as to the effect of the scheme —

- (a) between different new providers, or
- (b) between the old provider and a new provider,

to be referred to such arbitration as may be specified in or determined under the scheme.

73.—(1) This paragraph applies if, in consequence of an HSA transfer scheme, a person ("P") is entitled to possession of a document relating in part to the title to, or to the management of, land or other property.

(2) If the land or other property is in England and Wales —

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- (a) the scheme may provide for P to be treated as having given another person an acknowledgement in writing of the other person's right to production of the document and to delivery of copies of it, and
 - (b) section 64 of the Law of Property Act 1925⁽⁶⁷⁾ (production and safe custody of documents) is to apply to the acknowledgement and is to apply on the basis that the acknowledgement does not contain an expression of contrary intention.
- (3) If the land or other property is in Scotland, section 16(1) of the Land Registration (Scotland) Act 1979⁽⁶⁸⁾ (omission of certain clauses in deeds) has effect in relation to the transfer as if —
- (a) the transfer had been effected by deed, and
 - (b) the words "unless specially qualified" were omitted from that subsection.

Proof of title by certificate

74. A certificate issued by Monitor to the effect that any property, interest, right or liability vested (in accordance with an HSA transfer scheme) in a person specified in the certificate at a time so specified is conclusive evidence of the matters so specified.

Staff

75. The Transfer of Undertakings (Protection of Employment) Regulations 2006 apply to a transfer (under an HSA transfer scheme) of rights and liabilities under a contract of employment (whether or not the transfer would otherwise be a relevant transfer for the purposes of those regulations).

76. If an employee of the old provider becomes an employee of a new provider as a result of an HSA transfer scheme—

- (a) a period of employment with the old provider is to be treated as a period of employment with the new provider, and
- (b) the transfer to the new provider is not to be treated as a break in service.

Transfers in case of non-GB companies

77.—(1) This paragraph applies if the old provider is a non-GB company.

(2) The property, rights and liabilities which may be transferred by an HSA transfer scheme, or in or in relation to which interests, rights or liabilities may be created by an HSA transfer scheme, are confined to—

- (a) property of the old provider in Great Britain,
- (b) rights and liabilities arising in relation to its property in Great Britain, and
- (c) rights and liabilities arising in connection with its affairs and business so far as carried on in Great Britain.

Transfers by two or more health transfer schemes

78.—(1) This paragraph applies if there are two or more HSA transfer schemes making transfers to new providers.

(2) Paragraph 7 has effect as if —

- (a) in sub-paragraph (1)(a) the reference to property or rights transferred in accordance with an HSA transfer scheme included property or rights transferred in accordance with another HSA transfer scheme, and
- (b) in sub-paragraphs (2)(a) and (3) references to a new provider included a provider that is a new provider for the purposes of another HSA transfer scheme.

(3) Accordingly, in relation to anything done by an HSA transfer scheme as a result of this paragraph, any reference to a new provider in paragraphs 12 to 14 includes a provider that is a new provider for the purposes of another HSA transfer scheme.

Interpretation

79. In this Schedule—

⁽⁶⁷⁾ 1925 c. 20.
⁽⁶⁸⁾ 1979 c. 33.

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“enactment” includes—

- (a) an enactment contained in subordinate legislation, within the meaning of the Interpretation Act 1978⁽⁶⁹⁾,
- (b) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament, and
- (c) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales.

“HSA scheme” is to be read in accordance with paragraph 3(1).

EXPLANATORY NOTE

(This note is not part of the Order)

⁽⁶⁹⁾ 1978 c. 30.

Annex D: Process of administration as applied and modified by the draft HSA regulations

This annex shows a write out of Schedule B1 to the Insolvency Act 1986 as applied and amended by the draft health special administration regulations. The draft regulations should be read alongside sections 128 to 133 of the Health and Social Care Act 2012.

Health special administration - arrangement of schedule	
Nature of health special administration	Paragraphs 1, 7 and 8
Appointment of health special administrator by court	Paragraphs 11 to 13
Effect of health special administration	Paragraphs 40 to 45
Process of health special administration	Paragraphs 46 to 50, 54, 57 and 58
Functions of health special administrator	Paragraphs 59 to 68 and 70 to 75
Ending health special administration	Paragraphs 79 and 83 to 86
Replacing health special administrator	Paragraphs 87 to 91, 98 and 99
General	Paragraphs 100 to 107, 109 to 111, and 112 to 116

Nature of health special administration

Health special administration

- 1 (1) In this Schedule “health special administrator”, in relation to a company which is a relevant provider, means a person appointed by the court for the purposes of a health special administration order to manage its affairs, business and property.
- (2) For the purposes of this Schedule –
 - (a) a company is "in health special administration" while the appointment of a health special administrator of the company has effect,
 - (b) a company "enters health special administration" when the appointment of a health special administrator takes effect,
 - (c) a company ceases to be in health special administration when the appointment of a health special administrator of the company ceases to have effect in accordance with this Schedule, and
 - (d) a company does not cease to be in health special administration merely because a health special administrator vacates office (by reason of resignation, death or otherwise) or is removed from office.

2 Paragraph 2 is not applied as section 128(1) of the Health and Social Care Act 2012 provides that a health special administrator may only be appointed by court order.

Purpose of health special administration

- 3 *Paragraph 3 is not applied as section 129 of the Health and Social Care Act 2012 sets out the objective of a health special administration.*
- 4 *Paragraph 4 is not applied as section 128(6)(a) of the Health and Social Care Act 2012 requires a health special administrator to act as quickly and efficiently as reasonably practicable to achieve the objective of a health special administration.*

Status of health special administrator

- 5 *Paragraph 5 is not applied as section 128(4)(a) of the Health and Social Care Act 2012 sets out that a health special administrator is an officer of the court.*

General restrictions

- 6 *Paragraph 6 is not applied as section 128(5) of the Health and Social Care Act 2012 provides that only a qualified insolvency practitioner may be appointed as a health special administrator.*
- 7 The court has no power to make a health special administration order in relation to a company which is in administration.
- 8 The court has no power to make a health special administration order in relation to a company which has gone into liquidation.
- 9 Paragraph 9 is omitted as it relates to banks and insurance companies and is not relevant to health special administration.

Appointment of health special administrator by court

Health special administration order

10 Paragraph 10 is not applied as section 128(1) of the Health and Social Care Act 2012 sets out the meaning of a health special administration order.

Conditions for making order

11 (1) The court may make a health special administration order in relation to a company only if it is satisfied –

(a) that the company is unable, or is likely to become unable, to pay its debts, or

(b) that, on a petition by the Secretary of State under section 124A, it would be just and equitable (disregarding the objective of the health special administration) to wind up the company in the public interest.

(2) The court may not make a health special administration order on the ground set out in sub-paragraph (1)(b) unless the Secretary of State has certified to the court that the case is one in which the Secretary of State considers (disregarding the objective of the health special administration) that it would be appropriate to petition under section 124A.

Notice of application

12 (1) If Monitor makes an application for a health special administration order in relation to a company, Monitor must give notice of the application to –

(a) any person who has appointed an administrative receiver of the company,

(b) any person who is or may be entitled to appoint an administrative receiver of the company,

(c) any person who is or may be entitled to make an appointment in relation to the company under paragraph 14, and

(d) such other persons as may be prescribed.

(2) The notice must be given as soon as is reasonably practicable after the making of the application.

Powers of court

13 (1) On hearing a health special administration application the court may –

(a) make the health special administration order sought;

(b) dismiss the application;

(c) adjourn the hearing conditionally or unconditionally;

(d) make an interim order;

(e) treat the application as a winding-up petition and make any order which the court could make under section 125;

(f) make any other order which the court thinks appropriate.

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(2) An appointment of a health special administrator by health special administration order takes effect –

- (a) at a time appointed by the order, or
- (b) where no time is appointed by the order, when the order is made.

(3) An interim order under sub-paragraph (1)(d) may, in particular –

- (a) restrict the exercise of a power of the directors or the company;
- (b) make provision conferring a discretion on the court or on a person qualified to act as an insolvency practitioner in relation to the company.

14 to 39 Paragraphs 14 to 39 are omitted as they are not relevant to the making of a health special administration order.

Effect of health special administration

Dismissal of pending winding-up petition

40 A petition for the winding up of a company shall be dismissed on the making of a health special administration order in respect of the company.

Dismissal of administrative or other receiver

41 (1) When a health special administration order takes effect in respect of a company any administrative receiver of the company shall vacate office.

(2) Where a company is in health special administration, any receiver of part of the company's property shall vacate office if the health special administrator requires him to.

(3) Where an administrative receiver or receiver vacates office under sub-paragraph (1) or (2) –

(a) his remuneration shall be charged on and paid out of any property of the company which was in his custody or under his control immediately before he vacated office, and

(b) he need not take any further steps under section 40 or 59.

(4) In the application of sub-paragraph (3)(a) -

(a) "remuneration" includes expenses properly incurred and any indemnity to which the administrative receiver or receiver is entitled out of the assets of the company,

(b) the charge imposed takes priority over security held by the person by whom or on whose behalf the administrative receiver or receiver was appointed, and

(c) the provision for payment is subject to paragraph 43.

Moratorium on insolvency proceedings

42 (1) This paragraph applies to a company in health special administration.

(2) No resolution may be passed for the winding up of the company.

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(3) No order may be made for the winding up of the company.

Moratorium on other legal process

43 (1) This paragraph applies to a company in health special administration.

(2) No step may be taken to enforce security over the company's property except -

(a) with the consent of the health special administrator, or

(b) with the permission of the court.

(3) No step may be taken to repossess goods in the company's possession under a hire-purchase agreement except -

(a) with the consent of the health special administrator, or

(b) with the permission of the court.

(4) A landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except -

(a) with the consent of the health special administrator, or

(b) with the permission of the court.

(5) In Scotland, a landlord may not exercise a right of irritancy in relation to premises let to the company except –

(a) with the consent of the health special administrator, or

(b) with the permission of the court.

(6) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except –

(a) with the consent of the health special administrator, or

(b) with the permission of the court.

(6A) An administrative receiver of the company may not be appointed.

(6B) In considering whether to give permission under this paragraph, the court must have regard to the objective of the health special administration.

(7) Where the court gives permission for a transaction under this paragraph it may impose a condition on or a requirement in connection with the transaction.

(8) In this paragraph "landlord" includes a person to whom rent is payable.

Interim moratorium

44 (1) This paragraph applies where a health special administration application in respect of a company has been made and –

(a) the application has not yet been granted or dismissed, or

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(b) the application has been granted but the health special administration order has not yet taken effect.

(5) The provisions of paragraphs 42 and 43 shall apply (ignoring any reference to the consent of the health special administrator).

(7) This paragraph does not prevent or require the permission of the court for the carrying out by an administrative receiver (whenever appointed) of his functions.

Publicity

45 (1) While a company is in health special administration, every business document issued by or on behalf of the company or the health special administrator, and all the company's websites, must state -

(a) the name of the health special administrator, and

(b) that the affairs, business and property of the company are being managed by the health special administrator.

(2) Any of the following persons commits an offence if without reasonable excuse the person authorises or permits a contravention of sub-paragraph (1) -

(a) the health special administrator,

(b) an officer of the company, and

(c) the company.

(3) In sub-paragraph (1) "business document" means –

(a) an invoice,

(b) an order for goods or services,

(c) a business letter, and

(d) an order form,

whether in hard copy, electronic or any other form.

Process of health special administration

Announcement of health special administrator's appointment

46 (1) This paragraph applies where a person becomes the health special administrator of a company.

(2) As soon as is reasonably practicable the health special administrator shall -

(a) send a notice of his appointment to the company, and

(b) publish a notice of his appointment in the prescribed manner.

(3) As soon as is reasonably practicable the health special administrator shall -

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(a) obtain a list of the company's creditors, and

(b) send a notice of his appointment to each creditor of whose claim and address he is aware.

(4) The health special administrator shall send a notice of his appointment to the registrar of companies before the end of the period of 7 days beginning with the date specified in sub-paragraph (6).

(5) The health special administrator shall send a notice of his appointment to such persons as may be prescribed before the end of the prescribed period beginning with the date specified in sub-paragraph (6).

(6) The date for the purpose of sub-paragraphs (4) and (5) is the date on which the health special administration order comes into force.

(7) The court may direct that sub-paragraph (3)(b) or (5) -

(a) shall not apply, or

(b) shall apply with the substitution of a different period.

(8) A notice under this paragraph must -

(a) contain the prescribed information, and

(b) be in the prescribed form.

(9) A health special administrator commits an offence if he fails without reasonable excuse to comply with a requirement of this paragraph.

Statement of company's affairs

47 (1) As soon as is reasonably practicable after appointment the health special administrator of a company shall by notice in the prescribed form require one or more relevant persons to provide the health special administrator with a statement of the affairs of the company.

(2) The statement must-

(a) be verified by a statement of truth in accordance with Civil Procedure Rules,

(b) be in the prescribed form,

(c) give particulars of the company's property, debts and liabilities,

(d) give the names and addresses of the company's creditors,

(e) specify the security held by each creditor,

(f) give the date on which each security was granted, and

(g) contain such other information as may be prescribed.

(3) In sub-paragraph (1) "relevant person" means-

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- (a) a person who is or has been an officer of the company,
 - (b) a person who took part in the formation of the company during the period of one year ending with the date on which the company enters health special administration,
 - (c) a person employed by the company during that period, and
 - (d) a person who is or has been during that period an officer or employee of a company which is or has been during that year an officer of the company.
- (4) For the purpose of sub-paragraph (3) a reference to employment is a reference to employment through a contract of employment or a contract for services.
- (5) In Scotland, a statement of affairs under sub-paragraph (1) must be a statutory declaration made in accordance with the Statutory Declarations Act 1835 (c. 62) (and sub-paragraph (2)(a) shall not apply).
- 48 (1) A person required to submit a statement of affairs must do so before the end of the period of 11 days beginning with the day on which he receives notice of the requirement.
- (2) The health special administrator may -
- (a) revoke a requirement under paragraph 47(1), or
 - (b) extend the period specified in sub-paragraph (1) (whether before or after expiry).
- (3) If the health special administrator refuses a request to act under sub-paragraph (2) -
- (a) the person whose request is refused may apply to the court, and
 - (b) the court may take action of a kind specified in sub-paragraph (2).
- (4) A person commits an offence if he fails without reasonable excuse to comply with a requirement under paragraph 47(1).

Health special administrator's proposals

- 49 (1) The health special administrator of a company shall make a statement setting out proposals for achieving the objective of the health special administration (but this is subject to paragraph 49A).
- (2) A statement under sub-paragraph (1) must, in particular –
- (a) deal with such matters as may be prescribed, and
 - (b) where applicable, explain why the health special administrator thinks that the objective of the health special administration should be achieved by means other than just a rescue of the company as a going concern.
- (3) Proposals under this paragraph may include –
- (a) a proposal for a voluntary arrangement under Part 1 of this Act (although this paragraph is without prejudice to section 4(3)), or

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(b) a proposal for a compromise or arrangement to be sanctioned under Part 26 of the Companies Act 2006 (arrangements and reconstructions).

(4) The health special administrator shall send a copy of the statement of the proposals -

(a) to the registrar of companies,

(b) to every creditor of the company of whose claim and address the health special administrator is aware,

(c) to every member of the company of whose address the health special administrator is aware, and

(d) to such other persons as may be prescribed.

(5) If paragraph 49B does not apply, the health special administrator shall publish in the prescribed manner a report containing prescribed details of such of the proposals included in the statement under sub-paragraph (1) as may be prescribed.

(6) The health special administrator shall comply with sub-paragraph (4) and (if applicable) sub-paragraph (5) -

(a) as soon as is reasonably practicable after the company enters health special administration, and

(b) in any event, before the end of the period of eight weeks beginning with the day on which the company enters health special administration.

(7) The health special administrator shall be taken to comply with sub-paragraph (4)(c) if the health special administrator publishes in the prescribed manner a notice undertaking to provide a copy of the statement of proposals free of charge to any member of the company who applies in writing to a specified address.

(8) A health special administrator commits an offence if the health special administrator fails without reasonable excuse to comply with sub-paragraph (6).

(9) A period specified in this paragraph may be varied –

(a) by notice given by Monitor to the health special administrator which specifies the varied period, or

(b) in accordance with paragraph 107.

(10) A period may be extended under sub-paragraph (9)(a) –

(a) more than once, and

(b) after expiry.

Prior approval of statement etc

49A (1) The health special administrator may not make a statement under paragraph 49(1) unless a determination has been made, for the purposes of section 129(1)(a) of the 2012 Act, of the health care services which should continue to be provided.

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(2) Before making the statement under paragraph 49(1), the health special administrator must obtain the consent of—

(a) all of the commissioners, and

(b) Monitor,

to the proposals included in the statement.

(3) If the health special administrator does not obtain the consent of one or more of the commissioners (other than the Board), the requirement in sub-paragraph (2) is to be treated as met if the health special administrator obtains the consent of the Board.

(4) If the health special administrator is not able to make the statement under paragraph 49(1) because of a failure to obtain any consent required by this paragraph, the health special administrator may apply to the court for directions.

(5) Those directions may, in particular -

(a) make provision as to the proposals to be included in the statement, and

(b) treat any requirement under this paragraph to obtain consent as having been met if the proposals included in the statement comply with the directions.

(6) Nothing in sub-paragraphs (4) and (5) limits paragraph 63.

(7) In this Schedule “the commissioners” means the commissioners of the health care services provided for the purposes of the NHS by the company.

(8) In sub-paragraph (7) “commissioner”, in relation to a health care service, means the person who arranges for the provision of the service.

Public consultation on proposals contained in statement

49B (1) This paragraph applies if the implementation of the proposals included in the statement under paragraph 49(1) would involve a significant variation in the health care services which are provided as part of the NHS.

(2) The health special administrator shall, within the prescribed period, publish in the prescribed manner a report containing prescribed details of such of the proposals included in the statement under paragraph 49(1) as may be prescribed.

(3) At the same time as publishing the report, the health special administrator must publish in the prescribed manner a notice—

(a) which states that the health special administrator is seeking comments on such matters in the report as may be prescribed, and

(b) which describes how comments can be made (including details of how comments can be given in writing).

(4) The notice must specify a period of 6 weeks within which the health special administrator seeks comment (the “consultation period”).

(5) The first day of the consultation period must be within the period of 5 business days

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beginning with the day on which the report is published.

(6) The health special administrator—

(a) must, within the period of 14 days after the end of the consultation period, consider, and publish in the prescribed manner the health special administrator's responses to, any comments made, and

(b) may, as a result of any comments made, revise the proposals.

Creditors' meeting

50 (1) In this Schedule "creditors' meeting" means a meeting of creditors of a company summoned by the health special administrator –

(a) in the prescribed manner, and

(b) giving the prescribed period of notice to every creditor of the company of whose claim and address he is aware.

(2) A period prescribed under sub-paragraph (1)(b) may be varied in accordance with paragraph 107.

(3) A creditors' meeting shall be conducted in accordance with the rules.

Revision of health special administrator's proposals

54 (1) The health special administrator of a company—

(a) may on one or more occasions, and

(b) whether or not as a result of any comments made under paragraph 49B,

revise the proposals included in the statement made under paragraph 49(1) in relation to the company (but this is subject to paragraph 54A).

(2) Sub-paragraphs (3) and (4) apply—

(a) if the health special administrator thinks that a revision is substantial, or

(b) where paragraph 49B applies, if any revision is made.

(3) The health special administrator shall send a copy of the revised proposals –

(a) to the registrar of companies,

(b) to every creditor of the company of whose claim and address the health special administrator is aware,

(c) to every member of the company of whose address the health special administrator is aware, and

(d) to such other persons as may be prescribed.

(4) The health special administrator shall, within the prescribed period, publish in the prescribed manner a report containing prescribed details of such of the revised proposals

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as may be prescribed.

(5) A copy sent in accordance with sub-paragraph (3) must be sent within the prescribed period.

(6) The health special administrator is to be taken to have complied with sub-paragraph (3)(c) if the health special administrator publishes, in the prescribed manner, a notice undertaking to provide a copy of the revised proposals free of charge to any member of the company who applies in writing to a specified address.

(7) The health special administrator commits an offence if the health special administrator fails without reasonable excuse to comply with this paragraph.

Prior approval of revisions to proposals

54A (1) This paragraph applies –

(a) if the health special administrator thinks that a proposed revision under paragraph 54 is substantial, or

(b) where paragraph 49B applies, if a proposed revision under paragraph 54 relates to the health care services which are determined, for the purposes of section 129(1)(a) of the Health and Social Care Act 2012, to be services which should continue to be provided.

(2) The health special administrator must obtain the consent of—

(a) all of the commissioners, and

(b) Monitor,

before making the proposed revision.

(3) If the health special administrator does not obtain the consent of one or more of the commissioners (other than the Board), the requirement in sub-paragraph (2) is to be treated as met if the health special administrator obtains the consent of the Board.

(4) If the health special administrator is not able to revise proposals under paragraph 54 because of a failure to obtain any consent required by this paragraph, the health special administrator may apply to the court for directions.

(5) Those directions may, in particular -

(a) make provision as to the revisions to be made, and

(b) treat any requirement under this paragraph to obtain consent as having been met if the revisions made comply with the directions.

(6) Nothing in sub-paragraphs (4) and (5) limits paragraph 63.

Assistance of Monitor

57 (1) Monitor shall assist the health special administrator in discharging the health special administrator's functions.

(2) For that purpose Monitor shall have the power conferred by sub-paragraph (3) and

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such other functions as may be conferred on it by or under this Act.

(3) Monitor may require the health special administrator –

(a) to attend at any reasonable time and place of which the health special administrator is given at least seven days' notice, and

(b) to provide Monitor with information about the exercise of the health special administrator's functions.

Correspondence instead of creditors' meeting

58 (1) Anything which is required or permitted by or under this Schedule to be done at a creditors' meeting may be done by correspondence between the health special administrator and creditors –

(a) in accordance with the rules, and

(b) subject to any prescribed condition.

(2) A reference in this Schedule to anything done at a creditors' meeting includes a reference to anything done in the course of correspondence in reliance on sub-paragraph (1).

(3) A requirement to hold a creditors' meeting is satisfied by conducting correspondence in accordance with this paragraph.

Functions of health special administrator

General powers

59 (1) The health special administrator of a company may do anything necessary or expedient for the management of the affairs, business and property of the company.

(2) A provision of this Schedule which expressly permits the health special administrator to do a specified thing is without prejudice to the generality of sub-paragraph (1).

(3) A person who deals with the health special administrator of a company in good faith and for value need not inquire whether the health special administrator is acting within his powers.

60 (1) The health special administrator of a company has the powers specified in Schedule 1 to this Act.

(2) The health special administrator of a company has the power to act on behalf of the company for the purposes of any enactment which confers a power on the company or imposes a duty on it.

(3) In sub-paragraph (2) "enactment" includes –

(a) an enactment contained in subordinate legislation, within the meaning of the Interpretation Act 1978,

(b) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament, and

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(c) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales.

61 The health special administrator of a company -

(a) may remove a director of the company, and

(b) may appoint a director of the company (whether or not to fill a vacancy).

62 The health special administrator of a company may call a meeting of members or creditors of the company.

63 (1) The health special administrator of a company may apply to the court for directions in connection with his functions.

(2) Before giving directions under this paragraph, the court must give Monitor a reasonable opportunity of making representations about the proposed directions.

64 (1) A company in health special administration or an officer of a company in health special administration may not exercise a management power without the consent of the health special administrator.

(2) For the purpose of sub-paragraph (1)-

(a) "management power" means a power which could be exercised so as to interfere with the exercise of the health special administrator's powers,

(b) it is immaterial whether the power is conferred by an enactment or an instrument, and

(c) consent may be general or specific.

Distribution

65 (1) The health special administrator of a company may make a distribution to a creditor of the company.

(2) Section 175 shall apply in relation to a distribution under this paragraph as it applies in relation to a winding up.

(3) A payment may not be made by way of distribution under this paragraph to a creditor of the company who is neither secured nor preferential unless the court gives permission.

66 The health special administrator of a company may make a payment otherwise than in accordance with paragraph 65 or paragraph 13 of Schedule 1 if he thinks it likely to assist achievement of the objective of the health special administration.

General duties

67 The health special administrator of a company shall on his appointment take custody or control of all the property to which he thinks the company is entitled.

68 (1) Subject to sub-paragraph (2), the health special administrator of a company shall manage its affairs, business and property in accordance with the proposals as –

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- (a) set out in the statement made under paragraph 49 in relation to the company, and
- (b) from time to time revised under paragraph 54.

for achieving the objective of the health special administration.

(2) If the court gives directions to the health special administrator of a company in connection with any aspect of his management of the company's affairs, business or property, the health special administrator shall comply with the directions.

(3) The court may give directions under sub-paragraph (2) only if the directions are consistent with the achievement of the objective of the health special administration.

(4) Before giving directions under sub-paragraph (2), the court must give Monitor a reasonable opportunity of making representations about the proposed directions.

Health special administrator as agent of company

69 Paragraph 69 is not applied as section 128(4)(b) of the Health and Social Care Act 2012 sets out that in exercising functions in relation to the company, the health special administrator is the company's agent.

Charged property: floating charge

70 (1) The health special administrator of a company may dispose of or take action relating to property which is subject to a floating charge as if it were not subject to the charge.

(2) Where property is disposed of in reliance on sub-paragraph (1) the holder of the floating charge shall have the same priority in respect of acquired property as he had in respect of the property disposed of.

(3) In sub-paragraph (2) "acquired property" means property of the company which directly or indirectly represents the property disposed of.

Charged property: non-floating charge

71 (1) The court may by order enable the health special administrator of a company to dispose of property which is subject to a security (other than a floating charge) as if it were not subject to the security.

(2) An order under sub-paragraph (1) may be made only-

(a) on the application of the health special administrator, and

(b) where the court thinks that disposal of the property would be likely to promote the objective of the health special administration in respect of the company.

(3) An order under this paragraph is subject to the condition that there be applied towards discharging the sums secured by the security -

(a) the net proceeds of disposal of the property, and

(b) any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at the appropriate value.

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(4) If an order under this paragraph relates to more than one security, application of money under sub-paragraph (3) shall be in the order of the priorities of the securities.

(5) A health special administrator who makes a successful application for an order under this paragraph shall send a copy of the order to –

- (a) the registrar of companies, and
- (b) such other persons as may be prescribed,

before the end of the period of 14 days starting with the date of the order.

(6) A health special administrator commits an offence if he fails to comply with sub-paragraph (5) without reasonable excuse.

Hire-purchase property

72 (1) The court may by order enable the health special administrator of a company to dispose of goods which are in the possession of the company under a hire-purchase agreement as if all the rights of the owner under the agreement were vested in the company.

(2) An order under sub-paragraph (1) may be made only-

- (a) on the application of the health special administrator, and
- (b) where the court thinks that disposal of the goods would be likely to promote the objective of the health special administration in respect of the company.

(3) An order under this paragraph is subject to the condition that there be applied towards discharging the sums payable under the hire-purchase agreement -

- (a) the net proceeds of disposal of the goods, and
- (b) any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the goods at the appropriate value.

(4) A health special administrator who makes a successful application for an order under this paragraph shall send a copy of the order to –

- (a) the registrar of companies, and
- (b) such other persons as may be prescribed,

before the end of the period of 14 days starting with the date of the order.

(5) A health special administrator commits an offence if he fails without reasonable excuse to comply with sub-paragraph (4).

Protection for secured or preferential creditor

73 (1) A health special administrator's statement of proposals under paragraph 49 may not include any action which –

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- (a) affects the right of a secured creditor of the company to enforce his security,
- (b) would result in a preferential debt of the company being paid otherwise than in priority to its non-preferential debts, or
- (c) would result in one preferential creditor of the company being paid a smaller proportion of his debt than another.

(2) Sub-paragraph (1) does not apply to-

- (a) action to which the relevant creditor consents,
- (b) a proposal for a voluntary arrangement under Part I of this Act (although this sub-paragraph is without prejudice to section 4(3)),
- (c) a proposal for a compromise or arrangement to be sanctioned under Part 26 of the Companies Act 2006 (arrangements and reconstructions), or
- (d) a proposal for a cross-border merger within the meaning of regulation 2 of the Companies (Cross-Border Mergers) Regulations 2007.

(3) The reference to a statement of proposals in sub-paragraph (1) includes a reference to a statement as revised under paragraph 54.

Challenge to health special administrator's conduct of company

74 (1) A creditor or member of a company in health special administration may apply to the court claiming that -

- (a) the health special administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or
- (b) the health special administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).

(2) If a company is in health special administration, a person mentioned in sub-paragraph (2A) may apply to the court claiming that the health special administrator is acting in a manner preventing the achievement of the objective of the health special administration as quickly and efficiently as is reasonably practicable.

(2A) The persons who may apply to the court are –

- (a) Monitor,
- (b) a creditor or member of the company.

(3) The court may-

- (a) grant relief;
- (b) dismiss the application;
- (c) adjourn the hearing conditionally or unconditionally;

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- (d) make an interim order;
 - (e) make any other order it thinks appropriate.
- (4) In particular, an order under this paragraph may -
- (a) regulate the health special administrator's exercise of his functions;
 - (b) require the health special administrator to do or not do a specified thing;
 - (c) require a creditors' meeting to be held for a specified purpose;
 - (d) provide for the appointment of a health special administrator to cease to have effect;
 - (e) make consequential provision.
- (5) An order may be made on a claim under sub-paragraph (1) whether or not the action complained of -
- (a) is within the health special administrator's powers under this Schedule;
 - (b) was taken in reliance on an order under paragraph 71 or 72.
- (6) An order may not be made under this paragraph if it would impede or prevent the implementation of -
- (a) a voluntary arrangement approved under Part I,
 - (b) a compromise or arrangement sanctioned under Part 26 of the Companies Act 2006 (arrangements and reconstructions), or
 - (ba) a cross-border merger within the meaning of regulation 2 of the Companies (Cross-Border Mergers) Regulations 2007.
- (7) In the case of a claim made otherwise than by Monitor, the court may grant a remedy or relief or make an order under this paragraph only if it has given Monitor a reasonable opportunity of making representations about the claim and the proposed remedy, relief or order.
- (8) The court may grant a remedy or relief or make an order on an application under this paragraph only if it is satisfied, in relation to the matters that are the subject of the application, that, the health special administrator -
- (a) is acting,
 - (b) has acted, or
 - (c) is proposing to act,
- in a way that is inconsistent with the achievement of the objective of the health special administration as quickly and as efficiently as is reasonably practicable.
- (9) Before making an order of the kind mentioned in sub-paragraph (4)(d) -

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(a) the court must notify the health special administrator of the proposed order and of a period during which the health special administrator is to have the opportunity of taking steps falling within sub-paragraph (10) to (12), and

(b) the period notified must have expired without the taking of such of those steps as the court thinks should have been taken,

and that period must be a reasonable period.

(10) In the case of a claim under sub-paragraph (1)(a), the steps referred to in sub-paragraph (9) are -

(a) ceasing to act in a manner that unfairly harms the interest to which the claim relates,

(b) remedying any harm unfairly caused to those interests, and

(c) steps for ensuring that there is no repetition of conduct unfairly causing harm to those interests.

(11) In the case of a claim under sub-paragraph (1)(b), the steps referred to in sub-paragraph (9) are steps for ensuring that the interests to which the claim relates are not unfairly harmed.

(12) In the case of a claim under sub-paragraph (2), the steps referred to in sub-paragraph (9) are –

(a) ceasing to act in a manner preventing the achievement of the objective of the health special administration as quickly and as efficiently as is reasonably practicable,

(b) remedying the consequences of the health special administrator having acted in such a manner, and

(c) steps for ensuring that there is no repetition of conduct preventing the achievement of the objective of the health special administration as quickly and as efficiently as is reasonable practicable.

Misfeasance

75 (1) The court may examine the conduct of a person who -

(a) is or purports to be the health special administrator of a company, or

(b) has been or has purported to be the health special administrator of a company.

(2) An examination under this paragraph may be held only on the application of-

(a) the official receiver,

(b) the health special administrator of the company,

(ba) a person appointed as an administrator of the company under the provisions of this Act, as they have effect in relation to administrators other than health special administrators,

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- (bb) Monitor,
- (c) the liquidator of the company,
- (d) a creditor of the company, or
- (e) a contributory of the company.

(3) An application under sub-paragraph (2) must allege that the health special administrator -

- (a) has misapplied or retained money or other property of the company,
- (b) has become accountable for money or other property of the company,
- (c) has breached a fiduciary or other duty in relation to the company, or
- (d) has been guilty of misfeasance.

(4) On an examination under this paragraph into a person's conduct the court may order him -

- (a) to repay, restore or account for money or property;
- (b) to pay interest;
- (c) to contribute a sum to the company's property by way of compensation for breach of duty or misfeasance.

(5) In sub-paragraph (3) "health special administrator" includes a person who purports or has purported to be a company's health special administrator.

(6) An application under sub-paragraph (2) may be made in respect of a health special administrator who has been discharged under paragraph 98 only with the permission of the court.

Ending health special administration

76 to 78 Paragraphs 76 to 78 are not applied – health special administration will not end automatically at the end of one year. This approach is consistent with other special administration regimes.

Court ending health special administration

79 (1) On an application under sub-paragraph (2) or (2A), the court may provide for the appointment of a health special administrator of a company to cease to have effect from a specified time.

(2) An application may be made to the court under this sub-paragraph by the health special administrator if the health special administrator considers that the objective of the health special administration cannot be, or no longer needs to be, achieved.

(2A) An application may be made to the court under this sub-paragraph –

- (a) by Monitor, or

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(b) by the health special administrator,

if Monitor or the health special administrator (as the case may be) considers that the objective of the health special administration has been sufficiently achieved.

(2B) An application by the health special administrator under sub-paragraph (2A) may not be made without the consent of Monitor.

(4) On an application under this paragraph the court may –

(a) adjourn the hearing conditionally or unconditionally;

(b) dismiss the application;

(c) make an interim order;

(d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for).

80 to 82 Paragraphs 80 to 82 are not applied – this approach is consistent with other special administration regimes.

Moving from health special administration to creditors' voluntary liquidation

83 (1) This paragraph applies in England and Wales where the health special administrator of a company thinks -

(a) that the total amount which each secured creditor of the company is likely to receive has been paid to him or set aside for him, and

(b) that a distribution will be made to unsecured creditors of the company (if there are any).

(2) This paragraph applies in Scotland where the health special administrator of a company thinks –

(a) that each secured creditors of the company will receive payment in respect of his debt, and

(b) that a distribution will be made to unsecured creditors (if there are any).

(3) The health special administrator may, with the consent of Monitor, send to the registrar of companies a notice that this paragraph applies.

(4) On receipt of a notice under sub-paragraph (3) the registrar shall register it.

(5) If a health special administrator sends a notice under sub-paragraph (3) he shall as soon as is reasonably practicable –

(a) file a copy of the notice with the court, and

(b) send a copy of the notice to each creditor of whose claim and address he is aware.

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- (6) On the registration of a notice under sub-paragraph (3)—
- (a) the appointment of a health special administrator in respect of the company shall cease to have effect, and
 - (b) the company shall be wound up as if a resolution for voluntary winding up under section 84 were passed on the day on which the notice is registered.
- (7) The liquidator for the purposes of the winding up shall be -
- (a) a person nominated by the creditors of the company in the prescribed manner and within the prescribed period, or
 - (b) if no person is nominated under paragraph (a), the health special administrator.
- (8) In the application of Part IV to a winding up by virtue of this paragraph -
- (a) section 85 shall not apply,
 - (b) section 86 shall apply as if the reference to the time of the passing of the resolution for voluntary winding up were a reference to the beginning of the date of registration of the notice under sub-paragraph (3),
 - (c) section 89 does not apply,
 - (d) sections 98, 99 and 100 shall not apply, and
 - (e) section 129 shall apply as if the reference to the time of the passing of the resolution for voluntary winding up were a reference to the beginning of the date of registration of the notice under sub-paragraph (3).

Moving from health special administration to dissolution

- 84 (1) If the health special administrator of a company thinks that the company has no property which might permit a distribution to its creditors, he shall send a notice to that effect –
- (a) to Monitor, and
 - (b) if directed to do so by Monitor, to the registrar of companies.
- (3) On receipt of a notice under sub-paragraph (1)(b) the registrar shall register it.
- (4) On the registration of a notice in respect of a company under sub-paragraph (1)(b) the appointment of a health special administrator of the company shall cease to have effect.
- (5) If a health special administrator sends a notice under sub-paragraph (1)(b) he shall as soon as is reasonably practicable—
- (a) file a copy of the notice with the court, and
 - (b) send a copy of the notice to each creditor of whose claim and address he is aware.
- (6) At the end of the period of three months beginning with the date of registration of a

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notice in respect of a company under sub-paragraph (1)(b) the company is deemed to be dissolved.

(7) On an application in respect of a company by the health special administrator or another interested person the court may—

- (a) extend the period specified in sub-paragraph (6),
- (b) suspend that period, or
- (c) disapply sub-paragraph (6).

(8) Where an order is made under sub-paragraph (7) in respect of a company the health special administrator shall as soon as is reasonably practicable notify the registrar of companies and Monitor.

(9) A health special administrator commits an offence if he fails without reasonable excuse to comply with sub-paragraph (5).

Discharge of health special administration order where health special administration ends

85 (1) This paragraph applies where the court makes an order under this Schedule providing for the appointment of a health special administrator to cease to have effect.

(2) The court shall discharge the health special administration order.

Notice to Companies Registrar where health special administration ends

86 (1) This paragraph applies where the court makes an order under this Schedule providing for the appointment of a health special administrator to cease to have effect.

(2) The health special administrator shall send a copy of the order to -

- (a) the registrar of companies, and
- (b) such other persons as may be prescribed,

within the period of 14 days beginning with the date of the order.

(3) A health special administrator who fails without reasonable excuse to comply with sub-paragraph (2) commits an offence.

Replacing health special administrator

Resignation of health special administrator

87 (1) A health special administrator may resign only in prescribed circumstances.

(2) Where a health special administrator may resign he may do so only by notice in writing to the court.

Removal of health special administrator from office

88 The court may by order remove a health special administrator from office.

Health special administrator ceasing to be qualified

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89 (1) The health special administrator of a company shall vacate office if he ceases to be qualified to act as an insolvency practitioner in relation to the company.

(2) Where a health special administrator vacates office by virtue of sub-paragraph (1) he shall give notice in writing to the court.

(3) A health special administrator who fails without reasonable excuse to comply with sub-paragraph (2) commits an offence.

Supplying vacancy in office of health special administrator

90 Paragraph 91 applies where a health special administrator -

(a) dies,

(b) resigns,

(c) is removed from office under paragraph 88, or

(d) vacates office under paragraph 99.

91 (1) The court may replace a health special administrator on an application made –

(a) by Monitor, or

(b) where more than one person was appointed to act jointly or concurrently as the health special administrator, by any of those persons who remain in office.

92 to 97 *Paragraphs 92 to 97 are not applied as health special administration can only start by court order*

Vacation of office: discharge from liability

98 (1) Where a person ceases to be the health special administrator of a company (whether because he vacates office by reason of resignation, death or otherwise, because he is removed from office or because his appointment ceases to have effect) he is discharged from liability in respect of any action of his as health special administrator.

(2) The discharge provided by sub-paragraph (1) takes effect –

(a) in the case of a health special administrator who dies, on the filing with the court of notice of his death, or

(c) in any case, at a time specified by the court.

(4) Discharge –

(a) applies to liability accrued before the discharge takes effect, and

(b) does not prevent the exercise of the court's powers under paragraph 75.

Vacation of office: charges and liabilities

99 (1) This paragraph applies where a person ceases to be the health special administrator of a company (whether because he vacates office by reason of resignation, death or otherwise, because he is removed from office or because his appointment ceases to have

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effect).

(2) In this paragraph –

"the former health special administrator" means the person referred to in sub-paragraph (1), and

"cessation" means the time when he ceases to be the company's health special administrator.

(3) The former health special administrator's remuneration and expenses shall be-

(a) charged on and payable out of property of which he had custody or control immediately before cessation, and

(b) payable in priority to any security to which paragraph 70 applies.

(4) A sum falling within sub-paragraph (4A) shall be-

(a) charged on and payable out of property of which the former health special administrator had custody or control immediately before cessation, and

(b) payable in priority to any charge arising under sub-paragraph (3).

(4A) A sum falls within this sub-paragraph if it is a sum payable in respect of a debt or liability arising out of a contract that was entered into before cessation by the former health special administrator or a predecessor.

(5) Sub-paragraph (4A) shall apply to a liability arising under a contract of employment which was adopted by the former health special administrator or a predecessor before cessation; and for that purpose -

(a) action taken within the period of 14 days after a health special administrator's appointment shall not be taken to amount or contribute to the adoption of a contract,

(b) no account shall be taken of a liability which arises, or in so far as it arises, by reference to anything which is done or which occurs before the adoption of the contract of employment, and

(c) no account shall be taken of a liability to make a payment other than wages or salary.

(6) In sub-paragraph (5)(c) "wages or salary" includes-

(a) a sum payable in respect of a period of holiday (for which purpose the sum shall be treated as relating to the period by reference to which the entitlement to holiday accrued),

(b) a sum payable in respect of a period of absence through illness or other good cause,

(c) a sum payable in lieu of holiday,

(d) in respect of a period, a sum which would be treated as earnings for that period for

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the purposes of an enactment about social security, and

(e) a contribution to an occupational pension scheme.

General

Joint and concurrent health special administrators

100 (1) In this Schedule –

(a) a reference to the appointment of a health special administrator of a company includes a reference to the appointment of a number of persons to act jointly or concurrently as the health special administrator of a company, and

(b) a reference to the appointment of a person as health special administrator of a company includes a reference to the appointment of a person as one of a number of persons to act jointly or concurrently as the health special administrator of a company.

(2) If the court appoints two or more persons as the health special administrator of a company, the appointment must set out -

(a) which (if any) of the functions of a health special administrator are to be exercisable only by the appointees acting jointly,

(b) the circumstances (if any) in which functions of a health special administrator are to be exercisable by one of the appointees, or by particular appointees, acting alone, and

(c) the circumstances (if any) in which things done in relation to one of the appointees, or in relation to particular appointees, are to be treated as done in relation to all of them.

101 (1) This paragraph applies where two or more persons are appointed to act jointly as the health special administrator of a company.

(2) A reference to the health special administrator of the company is a reference to those persons acting jointly.

(3) But a reference to the health special administrator of a company in paragraphs 87, 91, 98 and 99 of this Schedule is a reference to any or all of the persons appointed to act jointly.

(4) Where an offence of omission is committed by the health special administrator, each of the persons appointed to act jointly -

(a) commits the offence, and

(b) may be proceeded against and punished individually.

(5) The reference in paragraph 45(1)(a) to the name of the health special administrator is a reference to the name of each of the persons appointed to act jointly.

(6) Where persons are appointed to act jointly in respect of only some of the functions of the health special administrator of a company, this paragraph applies only in relation to those functions.

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102 (1) This paragraph applies where two or more persons are appointed to act concurrently as the health special administrator of a company.

(2) A reference to the health special administrator of a company in this Schedule is a reference to any of the persons appointed (or any combination of them).

103 (1) Where a company is in health special administration, a person may be appointed to act as health special administrator jointly or concurrently with the person or persons acting as the health special administrator of the company.

(2) An appointment under sub-paragraph (1) must be made by the court on the application of -

(a) Monitor, or

(b) the person or persons acting as the health special administrator of the company.

(6) An appointment under sub-paragraph (1) may be made only with the consent of the person or persons acting as the health special administrator of the company.

Presumption of validity

104 An act of the health special administrator of a company is valid in spite of a defect in his appointment or qualification.

Majority decision of directors

105 A reference in this Schedule to something done by the directors of a company includes a reference to the same thing done by a majority of the directors of a company.

Penalties

106 (1) A person who is guilty of an offence under this Schedule is liable to a fine (in accordance with section 430 and Schedule 10).

(2) A person who is guilty of an offence under any of the following paragraphs of this Schedule is liable to a daily default fine (in accordance with section 430 and Schedule 10)

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(c) paragraph 46,

(d) paragraph 48,

(e) paragraph 49,

(h) paragraph 54,

(j) paragraph 71,

(k) paragraph 72,

(o) paragraph 84,

(p) paragraph 86, and

(q) paragraph 89.

Extension of time limit

107 (1) Where a provision of this Schedule provides that a period may be varied in accordance with this paragraph, the period may be varied in respect of a company –

- (a) by the court, and
- (b) on the application of the health special administrator.

(2) A time period may be extended in respect of a company under this paragraph-

- (a) more than once, and
- (b) after expiry.

108 Paragraph 108 is not applied as it is not relevant to the health special administration regime – this approach is consistent with other special administration regimes.

109 Where a period is extended under paragraph 107, a reference to the period shall be taken as a reference to the period as extended.

Amendment of provision about time

110 (1) The Secretary of State may by order amend a provision of this Schedule which -

- (a) requires anything to be done within a specified period of time,
- (b) prevents anything from being done after a specified time, or
- (c) requires a specified minimum period of notice to be given.

(2) An order under this paragraph-

- (a) must be made by statutory instrument, and
- (b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Interpretation

111 (1) In this Schedule –

“administrative receiver” has the meaning given by section 251,

“health special administrator” has the meaning given by paragraph 1 and, where the context requires, includes a reference to a former health special administrator,

“appropriate value” means the best price which would be reasonably available on a sale which is consistent with the achievement of the objective of the health special administration,

“the Board” means the National Health Service Commissioning Board,

“correspondence” includes correspondence by telephonic or other electronic means,

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“the commissioners” has the meaning given by paragraph 49A(7),

“company” and “court” have the same meaning as in Chapter 5 of Part 3 of the Health and Social Care Act 2012,

“creditors’ meeting” has the meaning given by paragraph 50,

“enters health special administration” has the meaning given by paragraph 1,

“floating charge” means a charge which is a floating charge on its creation,

“health care services” has the meaning given by section 64(3) of the Health and Social Care Act 2012,

“health special administration application” means an application to the court for a health special administration order under section 128 of the Health and Social Care Act 2012,

“health special administration order” has the same meaning as in Chapter 5 of Part 3 of the Health and Social Care Act 2012,

“in health special administration” has the meaning given by paragraph 1,

“hire-purchase agreement” includes a conditional sale agreement, a chattel leasing agreement and a retention of title agreement,

“the NHS” has the meaning given by section 64(4) of the Health and Social Care Act 2012,

“objective”, in relation to a health special administration, is to be read in accordance with section 129 of the Health and Social Care Act 2012,

“prescribed” means prescribed by rules,

“relevant provider” has the same meaning as in Chapter 5 of Part 3 of the Health and Social Care Act 2012,

“rules” means rules made under section 411 by virtue of sections 130(9) and (10) of the Health and Social Care Act 2012,

“unable to pay its debts” has the meaning given by section 123.

(3) In this Schedule a reference to action includes a reference to inaction.

(4) For the purposes of this Schedule a reference to a health special administration order includes a reference to an appointment under paragraph 91 or 103.

Non-UK companies

111A Paragraph 111A is not applied.

Scotland

112 In the application of this Schedule to Scotland –

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- (a) a reference to filing with the court is a reference to lodging in court, and
- (b) a reference to a charge is a reference to a right in security.

113 Where property in Scotland is disposed of under paragraph 70 or 71, the health special administrator shall grant to the donee an appropriate document of transfer or conveyance of the property, and –

- (a) that document, or
- (b) recording, intimation or registration of that document (where recording, intimation or registration of the document is a legal requirement for completion of title to the property),

has the effect of disencumbering the property of or, as the case may be, freeing the property from, the security.

114 In Scotland, where goods in the possession of a company under a hire-purchase agreement are disposed of under paragraph 72, the disposal has the effect of extinguishing as against the donee all rights of the owner of the goods under the agreement.

115 (1) In Scotland, the health special administrator of a company may make, in or towards the satisfaction of the debt secured by the floating charge, a payment to the holder of a floating charge which has attached to the property subject to the charge.

(2) In Scotland, where the health special administrator thinks that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 176A(2)(a), he may file a notice to that effect with the registrar of companies.

(3) On delivery of the notice to the registrar of companies, any floating charge granted by the company shall, unless it has already so attached, attach to the property which is subject to the charge and that attachment shall have effect as if each floating charge is a fixed security over the property to which it has attached.

116 In Scotland, the health special administrator in making any payment in accordance with paragraph 115 shall make such payment subject to the rights of any of the following categories of persons (which rights shall, except to the extent provided in any instrument, have the following order of priority) –

- (a) the holder of any fixed security which is over property subject to the floating charge and which ranks prior to, or pari passu with, the floating charge,
- (b) creditors in respect of all liabilities and expenses incurred by or on behalf of the health special administrator,
- (c) the health special administrator in respect of his liabilities, expenses and remuneration and any indemnity to which he is entitled out of the property of the company,
- (d) the preferential creditors entitled to payment in accordance with paragraph 65,
- (e) the holder of the floating charge in accordance with the priority of that charge in

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relation to any other floating charge which has attached, and

(f) the holder of a fixed security, other than one referred to in paragraph (a) which is over property subject to the floating charge.