Introduction

When Parliament created NHS foundation trusts, it provided them with independence from central government and a governance structure that ensured participation from within the local communities they serve.

NHS foundation trust governors are the direct representatives of local interests within foundation trusts. Governors do not undertake operational management of NHS foundation trusts; rather they challenge the board of directors and collectively hold them to account for the trust’s performance. It is also the governors’ responsibility to represent their members’ interests, particularly in relation to the strategic direction of the trust.

Legislation provides governors with statutory responsibilities to help deliver these key objectives. The legislation is the National Health Service Act 2006 (the 2006 Act).

There are now well over 3,800 NHS foundation trust governors charged with undertaking these responsibilities across England. It is important that they receive the help and support they require to fulfil these responsibilities sufficiently.
Why produce this guide?

In 2007, Monitor, the independent regulator of NHS foundation trusts, embarked on research to find out, from governors themselves, how well this unique system of governance was working – how engaged governors felt in their organisations, the effectiveness of communications with chairs and boards of directors and, crucially, how governors were exercising their statutory duties.

As the regulator we are concerned not only that the governance system of an NHS foundation trust is operating in a way that is compliant with the law, but that governors have the knowledge, support and resources to enable them to add maximum value to their organisations. The findings of the survey told us that regarding the discharging of statutory duties, governors would welcome further advice and support.

We consulted on a draft version of this guide in April 2009. This final version of the guide takes into account comments made during the consultation process. A summary of consultation responses is available on Monitor’s website, www.monitor-nhsft.gov.uk

What the guide covers

This guide focuses on the statutory duties of NHS foundation trust governors and examines ways in which governors can deliver these duties. Whilst we recognise the variety of other duties that governors may deliver, we also recognise the importance of preserving the autonomy of individual foundation trusts. As such, this guide confines itself to the statutory duties, central to all governors, whilst providing links to other bodies and resources which can support governors at a local level.
The status of this guide

This guide contains two distinct types of information for governors:

• statutory responsibilities – legal powers and duties which are of course mandatory and must be complied with; and

• suggested process steps which are not legal requirements, but are advisory and reflect best practice. It is not mandatory for NHS foundation trusts to comply with these process steps. However they provide examples and points for consideration for foundation trusts, including those trusts refreshing their existing processes.

Statutory duties

Legal requirements will be clearly identified at the start of each chapter within the document, distinct from the additional advice or information provided.
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The governance structure of an NHS foundation trust</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>What are NHS foundation trusts?</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>What is the governance structure of an NHS foundation trust?</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Who regulates NHS foundation trusts?</td>
<td>12</td>
</tr>
<tr>
<td>2</td>
<td>The role of the governor</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>What are the statutory powers and duties of the board of governors?</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>What does The NHS Foundation Trust Code of Governance say about governors?</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>Other duties</td>
<td>17</td>
</tr>
<tr>
<td>3</td>
<td>The governors and the chair</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>Section one: appointment of the chair</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>Section two: terms and conditions of the chair</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>Section three: removing the chair</td>
<td>30</td>
</tr>
<tr>
<td>4</td>
<td>The governors and the non-executive directors</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>Section one: appointing a non-executive director</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>Section two: terms and conditions of the non-executive directors</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>Section three: removing non-executive directors</td>
<td>44</td>
</tr>
<tr>
<td>5</td>
<td>Approving the appointment of the chief executive</td>
<td>47</td>
</tr>
<tr>
<td>6</td>
<td>The governors and the NHS foundation trust’s auditor</td>
<td>51</td>
</tr>
<tr>
<td></td>
<td>Section one: appointing the auditor</td>
<td>55</td>
</tr>
<tr>
<td></td>
<td>Section two: removing the auditor</td>
<td>57</td>
</tr>
<tr>
<td>7</td>
<td>Receiving the NHS foundation trust’s annual accounts, any report of the auditor on them, and the annual report</td>
<td>59</td>
</tr>
<tr>
<td></td>
<td>Quality accounts and governors</td>
<td>63</td>
</tr>
<tr>
<td>8</td>
<td>Preparing the forward plan</td>
<td>65</td>
</tr>
<tr>
<td>9</td>
<td>Further information</td>
<td>71</td>
</tr>
</tbody>
</table>
1 The governance structure of an NHS foundation trust

This chapter describes the role of the board of governors in the context of the overall structure of an NHS foundation trust.

Topics that we will look at in this chapter include:

- NHS foundation trusts in general terms;
- the governance structure of NHS foundation trusts; and
- the regulation of NHS foundation trusts.
What are NHS foundation trusts?

NHS foundation trusts provide healthcare according to core NHS principles: free care, based on need and not ability to pay.

They are free from central government control and have the freedom to make decisions for themselves. Nevertheless, they are subject to statutory requirements and all have a duty to exercise their functions effectively, efficiently and economically.

At the heart of the NHS foundation trust model is local accountability, in relation to which governors perform a pivotal role. Governors consist of elected and appointed individuals who represent members and other stakeholder organisations through a board of governors. They are the individuals that bind a trust to its patients, service users, staff and stakeholders.

The 2006 Act gives governors various statutory responsibilities; it is primarily these legal powers and duties that this guide explores further.

What is the governance structure of an NHS foundation trust?

Each NHS foundation trust has its own governance structure. This is set out in the NHS foundation trust’s constitution, which is published in the foundation trust directory on Monitor’s website: www.monitor-nhsft.gov.uk

The constitution defines how each NHS foundation trust will operate from a governance perspective. It is this document which governors should refer to, in order to best understand the particular arrangements, including the committee structure and procedures, adopted by their organisation regarding the statutory duties.

Although each constitution will be unique to the NHS foundation trust it relates to, there are legal requirements that apply to all NHS foundation trusts. The requirements are set out in Monitor’s Model Core Constitution, on which all NHS foundation trust constitutions must be based.

Monitor, as part of the authorisation process for successful applicant trusts, approves the constitution of each NHS foundation trust.
In addition to the formal statutory requirements, Monitor has also issued best practice advice on governance in *The NHS Foundation Trust Code of Governance* (“Code of Governance”). NHS foundation trusts are required to explain any non-compliance with the *Code of Governance*. The elements of this guide which reflect best practice advice complement the *Code of Governance*.

The basic governance structure of all NHS foundation trusts includes:

1. the membership;
2. the board of governors; and
3. the board of directors.

In addition to this basic structure, NHS foundation trusts will also make use of board committees and working groups, comprising both governors and directors, as a practical way of dealing with specific issues. Some committees (remuneration and audit) are required by legislation and others are referred to in the *Code of Governance* and elsewhere.

![Illustration of a board of governors](image-url)
Membership

The membership consists of staff, the general public and, optionally, patients or service users and their carers. Members belong to various constituencies as defined in each NHS foundation trust’s constitution. Members in the various constituencies vote to elect governors and can also stand for election themselves. An NHS foundation trust must have a public constituency and a staff constituency, and may also have a patient or service users’ constituency.

Board of governors

Figure one on page five illustrates the composition of a typical board of governors. The board of governors of an NHS foundation trust consists of elected NHS foundation trust members and appointed individuals or representatives from other key stakeholders.

The chair of the board of directors is also the chair of the board of governors. This is a legal requirement.

The legislation requires that the board of governors has appointed representatives from certain key stakeholders, such as a primary care trust that commissions services from the NHS foundation trust, and a local authority.

In addition to the appointed governors referred to above, the NHS foundation trust’s constitution will set out key stakeholders that are entitled to appoint representatives to the board of governors. Such stakeholders include, for example, local voluntary groups, trade unions or charities. There is no difference between the responsibilities of an elected and an appointed governor.

Several NHS foundation trusts have elected not to use the term “board of governors” and various alternatives are used including:

• council of governors;
• membership council;
• members’ council; and
• governors’ body.

Board of directors

The NHS foundation trust board of directors is responsible for all aspects of the performance of the NHS foundation trust. All the powers of the NHS foundation trust are exercisable by the board of directors on its behalf. The board of directors will have executive and non-executive directors and should include a balance of each. Additionally, the Code of Governance recommends that a majority of the board of directors are independent non-executive directors.

Executive directors

The executive directors must include a chief executive (who is also the accounting officer) and a finance director.

In addition, one of the executive directors must be a registered medical practitioner or dentist and one must be a registered nurse or midwife.
**Non-executive directors and the chair**
The non-executive directors will include the chair. A person may only be appointed as a non-executive director if he/she is a member of the public constituency (or the patients'/service users’ constituency where there is one). Where the trust has a university medical or dental school, a person may be appointed as a non-executive director if he/she exercises functions for that university.

**Committees of the board of directors**
The key committees included in the *Code of Governance* are set out below.

**Nominations committee**
The nominations committee or committees will be responsible for the identification and nomination of executive and non-executive directors.

The *Code of Governance* states that there may be one or two nominations committees. If you are unsure as to the structure adopted by your own trust, you can find out by referring to the individual constitution, listed on Monitor’s website, or by asking your trust directly.

If there are two committees, one will be responsible for dealing with nominations for executive directors and the other for dealing with nominations for non-executive directors (including the chair). The chair of the NHS foundation trust or an independent non-executive director should chair the committees.

Where an NHS foundation trust has two nominations committees, the nominations committee responsible for the non-executive directors should consist of a majority of governors. If only one nominations committee exists, when nominations for non-executive appointments, including the chair appointment, are being discussed, the trust should bear in mind the desirability of ensuring there is a majority of governor votes.

---

**Figure 2 Options for nominations committees**

<table>
<thead>
<tr>
<th>One nominations committee</th>
<th>Two nominations committees</th>
</tr>
</thead>
<tbody>
<tr>
<td>• a committee of the board of directors</td>
<td>• one nominations committee is focused solely on the nomination of executive directors – governor involvement is welcomed</td>
</tr>
<tr>
<td>• responsible for identification and nomination of both executive and non-executive directors</td>
<td>• the second nominations committee is focused solely on non-executive nominations and should consist of a majority of governors, though appropriate consultation with the executive directors must take place</td>
</tr>
<tr>
<td>• when considering non-executive appointments, the nominations committee must ensure appropriate governor involvement, potentially through a governors working group focused on non-executive appointments</td>
<td>• in this scenario, a governor working group is unlikely to be required</td>
</tr>
<tr>
<td>• the trust should bear in mind the desirability of ensuring a majority of governors votes for all non-executive nominations</td>
<td></td>
</tr>
</tbody>
</table>
Audit committee

The audit committee is responsible for monitoring and reviewing matters such as the integrity of financial statements of the NHS foundation trust, the NHS foundation trust’s internal financial controls and the internal audit function.

The main role and responsibilities of the audit committee should be set out in written terms of reference and should include details of how it will deliver these. Please see figure three below for details of the main roles and responsibilities.

<table>
<thead>
<tr>
<th>Role/Responsibility</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Review the trust’s internal financial controls</td>
<td>• And unless expressly addressed elsewhere (by a separate board committee or the board itself), review the trust’s internal control and risk management systems</td>
</tr>
<tr>
<td>Monitor the integrity of the financial statements</td>
<td>• Including any formal announcements relating to the trust’s financial performance, reviewing significant financial reporting judgements contained in them</td>
</tr>
<tr>
<td>Monitor the internal audit function</td>
<td>• And review the effectiveness of the internal audit function</td>
</tr>
<tr>
<td>Review and monitor the external auditor’s independence and objectivity</td>
<td>• And the effectiveness of the audit process, taking into consideration relevant UK professional and regulatory requirements</td>
</tr>
<tr>
<td>Develop and implement policy on the engagement of the external auditor to supply non-audit services</td>
<td>• Taking into account relevant ethical guidance regarding the provision of non-audit services by the external audit firm</td>
</tr>
<tr>
<td>Report to the board of governors</td>
<td>• Identifying any matters in respect of which it considers that action or improvement is needed and making recommendations as to the steps to be taken</td>
</tr>
</tbody>
</table>

Figure 3 Main roles and responsibilities of the audit committee
The audit committee is not responsible for the appointment of external auditors; that is the responsibility of the board of governors. That said, it may prove beneficial to the governors to use the skills and experience of the audit committee if they feel this is appropriate.

The audit committee must consist of non-executive directors and is appointed by the board of directors. The Code of Governance states that the committee should have at least three independent non-executive directors and that at least one member of the audit committee should have recent and relevant financial experience.

Governors are not members of the audit committee. However, under the Code of Governance, the audit committee should report to the board of governors, identifying any matters where it considers action or improvement is needed and making recommendations on the steps to be taken.

Remuneration committee
The board of directors must establish a remuneration committee composed of non-executive directors. This committee has responsibility for setting the terms and conditions of office, including remuneration (pay and benefit entitlements) and allowances of the executive directors.

The remuneration committee does not have a direct role in relation to the terms and conditions of the chair and the other non-executive directors. Responsibility here lies with the board of governors.

Other committees or governor working groups
The three committees described above are those set out in legislation and the Code of Governance. Governors can and do add value by contributing to a wide variety of other committees or governor working groups. The following committees have been suggested by NHS foundation trusts and governors as examples of committees where governor involvement has proved beneficial:

- clinical quality;
- membership strategy and engagement;
- strategic planning and policy;
- patient experience; and
- auditor appointment.

These committees consist of a mixture of governors and directors in some trusts, providing an additional source of partnership working across both boards.

Have you considered?
If governor attendance at selected audit committee meetings would be helpful, in addition to any training provided.
Other useful roles in the governance structure

In addition to the key statutory roles of the chair and chief executive, there are other positions suggested in the *Code of Governance* and elsewhere as being highly significant to the efficient and effective running of an NHS foundation trust.

**Deputy chair**

The *Model Core Constitution* recommends that an NHS foundation trust’s constitution provides for a deputy chair. The deputy chair will be one of the NHS foundation trust’s non-executive directors and should deputise for the chair as and when appropriate.

**Senior independent director (SID)**

The *Code of Governance* states that one of the independent non-executive directors should be appointed by the board of directors as the “senior independent director” or “SID”. This appointment should be made in consultation with the board of governors. The SID should act as the point of contact if governors have concerns which contact through normal channels has failed to resolve or for which such normal contact is inappropriate.

Further details in relation to the role of the senior independent director and what “independent” means can be found in the *Code of Governance*.

**Lead governor**

The chair of the board of directors is also the chair of the board of governors. The NHS foundation trust may decide that one governor should lead the board of governors where it is not considered appropriate for the chair or another one of the non-executive directors to do so. These occasions are likely to be infrequent but one example may be a meeting discussing the appointment of the chair.

The lead governor could also have a role in certain circumstances where it would not be appropriate for the chair to contact Monitor, or Monitor to contact the chair (for example, in relation to appointment of the chair). Communication would instead take place between the lead governor and Monitor in such circumstances. Routine communication from Monitor to governors will, as a matter of course, be disseminated via board secretaries.

The existence of a lead governor does not, in itself, prevent any governor from making contact with Monitor directly if they feel it is necessary.

It is suggested that the term lead governor is used, to prevent confusion with the deputy chair. Alternative titles such as vice chair or presiding governor have also been suggested.

The lead governor should be chosen by the board of governors. The lead governor should not deputise for the deputy chair of the board of directors.
**Trust secretary**

NHS foundation trusts generally have a trust secretary (sometimes known as the board or company secretary). The trust secretary, typically but not always an employee of the trust, often has a significant role to play in relation to the board of governors. For example, they can be expected to:

- ensure the procedures of the board of governors (as contained in the NHS foundation trust’s constitution and/or elsewhere) are complied with;
- advise the board of governors (through the chair) on all governance matters; and
- ensure good information flows within the NHS foundation trust, including to/from the board of governors.

Under the *Code of Governance*, the appointment and removal of the trust or board secretary will be a joint matter for the chief executive and chair.

**Membership secretary**

Some NHS foundation trusts have also invested in the provision of a membership office or a membership secretary. The office may be responsible for:

- ensuring the flow of information between members and governors, for example sending out newsletters, coordinating member surveys and administering membership card schemes;
- coordinating, as appropriate, the elections for the board of governors;
- providing administrative support for governors to perform their duties; and
- maintaining the membership database and providing high level reports on membership.

Neither the trust secretary nor the membership secretary are mandatory roles and NHS foundation trusts may have established different roles to cover these responsibilities. You can check with your trust to see what functions or roles they have established to support governors and members.

---

**The Nolan Principles**

All holders of public office should adhere to the seven principles of public life, as defined by the Nolan Committee. The committee sets the principles out for the benefit of all who serve the public in any way, and as such these principles apply to NHS foundation trust governors.

- **Selflessness**
- **Integrity**
- **Objectivity**
- **Accountability**
- **Openness**
- **Honesty**
- **Leadership**

Further information on the Nolan Principles can be found on this website: [www.public-standards.org.uk](http://www.public-standards.org.uk)
Who regulates NHS foundation trusts?

Monitor is the Independent Regulator of NHS Foundation Trusts. It authorises and regulates NHS foundation trusts, making sure that they are legally constituted, well-led and financially robust.

Monitor receives and considers applications from bodies that seek NHS foundation trust status. If Monitor is satisfied that certain criteria are met, it authorises the relevant body as an NHS foundation trust. As part of this authorisation, the new NHS foundation trust is issued with “terms of authorisation”. These set out various conditions under which an NHS foundation trust is required to operate.

Monitor will look at an NHS foundation trust’s activities to ensure that the NHS foundation trust complies with its terms of authorisation. The terms of authorisation set out the requirements placed on NHS foundation trusts and these requirements include, but are not limited to:

- putting, keeping in place and complying with arrangements for the purpose of monitoring and improving the quality of healthcare provided by and for that NHS foundation trust;
- delivering healthcare services to specified standards under agreed contracts with their commissioners;
- operating effectively, efficiently and economically as a going concern; and
- governing themselves in accordance with best practice, maintaining the organisation’s capacity to deliver mandatory services.

Each NHS foundation trust’s full terms of authorisation are published on Monitor’s website (www.monitor-nhsft.gov.uk). The essential terms of authorisation are the same for every NHS foundation trust. The schedules to the terms of authorisation contain bespoke requirements for each individual NHS foundation trust. Governors should familiarise themselves with their trust’s terms of authorisation.

Monitor can use its statutory powers to intervene in the running of a failing NHS foundation trust, where the NHS foundation trust is in significant breach of its terms of authorisation.

Intervention could include:

- requiring the NHS foundation trust, its directors or its governors to do, or not do, certain things; or
- removing or suspending any or all of the board of directors or the board of governors.

Whilst these powers may only be used where there is significant failure by an NHS foundation trust to comply with its terms of authorisation, it is important that governors appreciate these powers exist. More details on Monitor’s role can be found in the leaflet in the pocket of this guide, Guide to Monitor for NHS Foundation trust governors.
As this guide explains, the board of governors has its own powers to intervene where the trust’s performance is not acceptable. For example, the board of governors can also remove the chair and/or the non-executive directors of an NHS foundation trust. The powers of the board of governors in this regard are described more fully in this guide.

**Care Quality Commission**

The Care Quality Commission, as the regulator of clinical quality, has primary responsibility for reviewing quality of care across the NHS, and provides the main source of information which feeds into Monitor’s assessment and compliance activities in this area.

---

**Accountability structure of NHS foundation trusts**

![Diagram of accountability structure of NHS foundation trusts]

Figure 5: Accountability structure of NHS foundation trusts
The role of the governor

The 2006 Act gives the board of governors various statutory roles and responsibilities. This chapter sets out what, in formal terms, it means to be a governor of an NHS foundation trust.

Issues that we will look at in this chapter include:

• the statutory powers and duties of governors; and

• other requirements of governors, particularly those set out in the Code of Governance.
What are the statutory powers and duties of the board of governors?

The specific statutory powers and duties of the board of governors are to:

- appoint and, if appropriate, remove the chair;
- appoint and, if appropriate, remove the other non-executive directors;
- decide the remuneration and allowances, and the other terms and conditions of office, of the chair and the other non-executive directors;
- approve the appointment of the chief executive;
- appoint and, if appropriate, remove the NHS foundation trust’s auditor; and
- receive the NHS foundation trust’s annual accounts, any report of the auditor on them and the annual report.

In addition:

- in preparing the NHS foundation trust’s forward plan, the board of directors must have regard to the views of the board of governors.
What does The NHS Foundation Trust Code of Governance say about governors?

In the Code of Governance, Monitor has provided best practice advice on what it means to be a governor. The key principles are as follows:

• every NHS foundation trust will have a board of governors which is responsible for representing the interests of NHS foundation trust members, and partner organisations in the local health economy in the governance of the NHS foundation trust;

• governors must act in the best interests of the NHS foundation trust and should adhere to its values and code of conduct;

• the board of governors should hold the board of directors collectively to account for the performance of the NHS foundation trust, including ensuring the board of directors acts so that the NHS foundation trust does not breach the terms of its authorisation; and

• governors are responsible for regularly feeding back information about the NHS foundation trust, its vision and its performance to the constituencies and the stakeholder organisations that either elected them or appointed them.

Governors should acknowledge the overall responsibility of the board of directors for running the NHS foundation trust and should not try to use the powers of the board of governors to veto the decisions of the board of directors. Figure six on page 18 illustrates options of how governors can hold the board of directors to account.

Governors should read the detailed terms of the Code of Governance, particularly in respect of their role within the NHS foundation trust, in addition to the NHS foundation trust constitution, which will provide information on matters such as the NHS foundation trust’s values and code of conduct.

Other duties

Governors may also be usefully involved in many areas not covered by the legislation. Examples below illustrate some key areas where NHS foundation trusts have made great use of the skills and experience of their governors:

• holding constituency meetings to communicate with members and understand members’ views;

• patient and service user liaison regarding patient experience;

• providing a governor perspective on trust performance such as the healthcare standards’ declarations;

• developing and reviewing the membership strategy, ensuring representation and engagement levels are maintained and increased as appropriate;

• working with other representative bodies such as LINks;

• working with hospital volunteers; and

• giving talks to interested stakeholders.

Organisations such as the Foundation Trust Network and the Foundation Trust Governors’ Association may provide additional support and advice in these areas. More details about these organisations can be found in the Further information section of this guide.
Holding the board of directors to account

Key principles
1. the overall responsibility for running an NHS foundation trust lies with the board of directors
2. the board of governors is the collective body through which the directors explain and justify their actions
3. governors must act in the best interests of the NHS foundation trust and should adhere to its values and code of conduct

Standard methods for governors to provide scrutiny and assistance
a. receiving the annual report and accounts
b. receiving the quality report and accounts
c. receiving in-year information updates from the board of directors
d. receiving performance appraisal information for the chair and other non-executive directors
e. inviting the chief executive or other executive and non-executive directors to attend board of governors meetings as appropriate

Further methods available to governors
a. engagement with the board of directors to share concerns
b. employment of statutory duties
c. dialogue with Monitor via the lead governor

Figure 6 Holding the board of directors to account
The chair performs a crucial role within the NHS foundation trust and this chapter sets out some of the key issues that governors will need to consider in relation to the chair.

Issues that we will look at in this chapter include:

- appointment of the chair;
- terms and conditions; and
- removing the chair.
What are the legal requirements?

Appointment and removal

The legislation says:

“It is for the board of governors at a general meeting to appoint or remove the chairman…”.

Therefore, it is for the board of governors as a whole (rather than, say, a committee or a working group) to appoint or remove the chair.

In accordance with the legislation:

• appointment is by a majority of the governors attending the relevant general meeting; and
• removal requires the approval of three-quarters of the members of the board of governors, not just those who attend the meeting at which the chair removal is to be discussed and determined.

Terms and conditions

The law says:

“It is for the board of governors at a general meeting to decide the remuneration and allowances, and the other terms and conditions of office, of the non-executive directors”.

The chair is one of the non-executive directors.

Therefore, the board of governors is not only responsible for appointing the chair, it also sets the terms of that appointment.
What other responsibilities are there?

Best practice (as set out in the Code of Governance and elsewhere) means that governors should perform specific additional tasks in relation to the chair.

Annual performance appraisal

Conducting performance appraisals and then reviewing the results will significantly assist the board of governors in performing its statutory duties, specifically when considering the potential re-appointment or removal of the chair.

Therefore, the board of governors should take the lead on determining a process for the evaluation of the chair. The senior independent director should lead the actual appraisal, although the lead governor can also have a significant role to play. The outcome of the evaluation should then be discussed and agreed with the board of governors. If your NHS foundation trust has already developed its own processes for evaluation of the chair, the board of governors should periodically review the effectiveness of the process.

The focus of the chair’s appraisal will be his/her performance as chair of the board of directors and it should consider carefully the performance against pre-defined objectives that support the delivery of the trust’s forward plan. This is largely because the legislation states that it is the chair of the board of directors that chairs the board of governors (not the other way around). The primary aim of the chair’s work will be leading the directors.

This does not mean however that performance as the chair of the board of governors is not a highly relevant part of the appraisal. The process should still be used as an opportunity to evaluate all relevant performance issues, including those relating to the governors.

Appointing a deputy chair

Where an NHS foundation trust’s constitution makes provision for one, the governors should appoint a deputy chair from the other non-executive directors.

Given that the nature of the role is to stand in for the chair as required, this appointment should be made on the same basis as the appointment of the chair. The process of appointment will be different though in that the appointed person will be selected from the existing non-executive directors. So, the board of governors will look at applicants from the current non-executive directors and choose from them. The Code of Governance states that the senior independent director could be the deputy chair.

It is important to recognise the need for the deputy chair to hold the confidence of the board of directors and as such, governors should take into serious consideration the views of that body.

The board of governors may, in the appropriate circumstances, decide that none of the candidates are appropriate for the role. If so, the board of governors should consider next steps in light of the NHS foundation trust’s constitution and the need for a deputy chair.

Have you considered?

- The potential use of an external party to perform appraisals to protect the confidentiality of individuals involved.
- Use of the lead governor to collate all governor input regarding the performance of the chair.
- The Appointments Commission’s materials on appraisals (available on its website).
Section one: appointment of the chair

The Code of Governance states that “There should be a formal, rigorous and transparent procedure for the appointment or election of new members to the boards of directors”.

As the chair is the leader of both boards, governors will need to do a considerable amount of work to ensure that their NHS foundation trust has the right chair in place.

General considerations

Further detail in relation to the role of a chair is given in the Code of Governance. Governors should read this carefully before embarking on an appointment or re-appointment process. The chair is one of the non-executive directors, therefore the later chapters on non-executive directors will also be relevant.

As with all appointments, the procedure for appointment or re-appointment must be formal, rigorous and transparent. The appointment must be awarded on merit and based on objective criteria developed in the best interest of the trust.

The process should be described in the NHS foundation trust’s annual report.

Triggers for action

The most common trigger for action will be the impending expiry of the existing chair’s term of appointment. The chair may decide to seek re-appointment, in which case a decision will need to be made as to whether this is in the best interests of the NHS foundation trust and should happen.

If re-appointment is not sought, or it is decided that it is not appropriate to re-appoint (see later section on when re-appointment is sought), a new appointment will need to be made.

The governors also have the power to remove an existing chair. If a chair is removed in this way, again, a new appointment will need to be made.

Have you considered?

- If the process for re-appointment of a chair should include the potential for open competition.
- What level of internal training on recruitment could be provided for those governors who sit on the nominations committee or relevant governor working groups.

Figure 7 Key stages of chair appointment process
What if re-appointment is sought?

Where an existing chair seeks re-appointment, the nominations committee, and where appropriate the governors’ working group, should look at the existing candidate against the current job and person specification for their role at the NHS foundation trust. This job description should be reviewed on an ongoing basis by the nominations committee. In addition, the following matters should be considered.

Annual performance appraisals

The governors will need to consider the candidate’s past performance at the NHS foundation trust, with particular regard to delivery of the role’s objectives. The senior independent director should confirm to the governors whether, following formal performance evaluation, the performance of the chair continues to be effective and demonstrates commitment to the role.

It is the performance of the chair as the chair of the board of directors that is relevant here. The process should still be used as an opportunity to evaluate all relevant performance issues, including those relating to the governors, but it should not be the focus of consideration in relation to re-appointment.

Commitments

Any changes in the candidate’s other significant commitments will be relevant. The new position in respect of commitments should be compared against the time commitment expected.

Refreshing the board of directors

Refreshment of the board provides an opportunity to reassess the skills, knowledge and experience required by the NHS foundation trust. It ensures the board of directors is exposed to new approaches, experiences and ways of working. It is healthy for the NHS foundation trust progressively to refresh the board of directors and this includes the chair.

Terms

The re-appointment, if it happens, should be for a specified term of no longer than three years. Any candidate that has already served six years or more in the post should be rigorously reviewed and the process should take into account the need for progressive refreshing of the board of directors.

The Code of Governance states that “non-executive directors may serve longer than nine years” subject to annual re-appointment.

Once these processes have been undertaken, the re-appointment can be put to the full board of governors for a final decision (see figure 7 on page 22).
Deciding on a process

The governors should agree with the nominations committee a clear process for the nomination of a new chair or the re-appointment of an existing one. This process should include taking appropriate advice from within the NHS foundation trust, such as from the trust’s own HR department.

Where there is a specific nominations committee in respect of the chair (and the other non-executive directors), then the board of governors should agree a process with that committee. Where there is only one nominations committee, the board of governors should appoint a working group, headed by the lead governor, to agree the process with the nominations committee and to report back to the board of governors.

In either case, the nominations committee should decide on a job description and person specification defining the role and capabilities required, including an assessment of the time commitment expected for the role. Terms and conditions for the post should be proposed and, in usual circumstances, the post should be advertised. These matters should be agreed with the governors’ working group where there is one.

The nominations committee, and where appropriate the governors’ working group, should take into account the views of the board of directors (particularly the non-executive directors) on the process in general and the qualifications, skills and experience required for the position. In the same way and as appropriate, the nominations committee should consult other key stakeholders.

Temporary appointments

When appropriate forward plans are in place, temporary arrangements are likely to occur only in exceptional circumstances. However, under such circumstances such as the chair vacancy occurring at short notice, the governors may need to consider whether a temporary appointment needs to be made while the formal appointment process is being run. It may be that the deputy chair is able to fulfil this role for the period required. The NHS foundation trust should refer to its constitution in the first instance.

What if a new appointment needs to be made?

If an existing chair does not seek re-appointment on their current term expiring, their re-appointment is not approved without competition or they are otherwise removed by either the board of governors or Monitor (where following Monitor’s intervention, the board of governors is left to make an appointment), the NHS foundation trust will need to seek a new appointment. It is a statutory requirement for every NHS foundation trust to have a chair.

A new appointment will mean, of course, that reliance on previous internal performance evaluations will not be possible. As a result, the appointment process will need particular care and scrutiny, and the board of governors must take the lead in ensuring that a well-defined and robust recruitment process is in place.

Have you considered?
The views of the board of directors on the qualifications, skills and experience required for such a position.
Getting the right external advice and support
The board of governors is likely in many cases to decide that, in addition to the advice and support offered by the NHS foundation trust’s own HR specialists, taking external advice on recruitment and the search process is appropriate. This decision should be taken in collaboration with the nominations committee or governors’ working group.

Typical reasons include where there is limited experience of senior recruitment within the governor group or where tough employment market conditions prevail.

If selecting external advisers, governors should consider matters including the potential advisers’:

- previous experience of board-level recruitment;
- independence from the NHS foundation trust;
- track record of successful appointments;
- previous experience of public sector recruitment;
- knowledge of the health sector and candidate research ability; and
- selected principles and processes, such as candidate assessment techniques.

Applications
The nominations committee with input, where appropriate, from a governors’ working group and other key stakeholders may need to sift through the applications received for the post following its advertisement. The precise nature of this sifting will depend upon the circumstances in which the vacancy arose, the number of applications received and of candidates that are potentially appointable. The sifting process should seek to produce a diverse field of strong candidates for interview. Again, this may require external assistance, for example, from a recruitment consultant.

The nominations committee (taking into account the views of other non-executive directors and the governors’ working group where there is one) should then put together a shortlist of no fewer than two candidates, with three or four candidates being the ideal numbers.
Interview

NHS foundation trusts should ensure there is majority governor representation on the interview panel.

Typically, the nominations committee, with participation, where appropriate, from the governors’ working group, will interview the shortlisted candidates. An assessment should then be made as to which of the shortlisted candidates are appointable.

The appointable candidates are then put forward to the board of governors for the final decision on appointment, typically within a final report.

The final report should be presented, incorporating the proposal for re-appointment or the presentation of new candidates, to the board of governors for consideration. The report should summarise the process followed by the nominations committee, including the selection criteria where appropriate.

The report should then describe how, and to what extent, the candidates meet the criteria for the role, their relative strengths and weaknesses and a recommendation on how the board of governors should proceed. The report must at all times ensure client confidentiality is maintained in accordance with the NHS foundation trust’s own protocols.

How will the final decision be made?

The board of governors must then make an appointment decision in accordance with its statutory obligations. As part of this, the board of governors will consider the issues set out in the report and any other factors it considers relevant. In particular, it should satisfy itself that all applicable law and advice has been complied with, the process followed was legal and appropriate and that the proposed appointee has the right qualities to meet the job description for the role.

The board of governors should consult the board of directors (particularly the other non-executive directors) before the final decision is made.

Once the appointment decision is made, the senior independent director and the governors should set the appointee objectives for the coming year.

The full process followed for the appointment/re-appointment of the chair should be described in the NHS foundation trust’s annual report.

Have you considered?

- The potential use of stakeholder panels to review shortlisted candidates’ skills and experience against the person specification, to identify areas to probe at interview (confidentiality respected).
- The use of independent assessors on the interview panel.
Section two: terms and conditions of the chair

A significant factor in attracting, retaining and motivating the chair will be the terms and conditions, including pay, on offer to them. This section provides advice on how governors should strike the right balance between motivating the right candidates and paying no more than is necessary.

What do the terms and conditions consist of?

The terms and conditions will form the chair’s appointment with the NHS foundation trust. They cover a variety of issues, the most important of which will include:

- the term that the chair will serve;
- the responsibilities of the chair;
- the remuneration and allowances that the chair will receive. This will include any pay that the individual receives, but can also include non-taxable amounts;
- the location of work;
- the hours of work expected; and
- termination provisions including notice periods.

The most common point at which the terms and conditions for the chair are set is on their appointment. However, the terms and conditions can be reviewed and altered throughout the chair’s term at the NHS foundation trust, provided the correct processes are followed.

How should the process work?

There should be a transparent procedure for deciding the terms and conditions of the chair.

The terms and conditions in relation to a new appointment will be formulated by the nominations committee and agreed, where appropriate, with the governors’ working group prior to the appointment being made.

The nominations committee and, where appropriate, the governors’ working group may also wish to consult with the NHS foundation trust’s remuneration committee regarding this process.

It must be remembered that the board of governors as a whole at a general meeting must make the final decision on the terms and conditions of the chair, and it could choose to reject the proposals. With respect to existing appointments, again, it is the board of governors as a whole that makes the final decision on any revised terms and conditions.

Have you considered?

- Obtaining an NHS foundation trust definition of “value for money” in this context.
- How to best make use of the HR specialists within the NHS foundation trust during this process.

Have you considered?
New appointments – how do governors meet their responsibilities?

The nominations committee and, where appropriate, the governors’ working group should agree the process for setting terms and conditions as part of the overall appointments process. This should be done after the job description has been finalised but before the post is advertised.

The factors that the nominations committee, (where appropriate) the governors’ working group and, eventually, the board of governors will need to examine will vary depending on the position.

However, central factors will be the:

- time commitment required by the role;
- responsibilities covered by the role; and
- terms and conditions available at similar NHS foundation trusts and other comparable organisations.

In addition to the advice and support available from the NHS foundation trust’s own HR specialists, professional advice may need to be taken particularly on prevailing terms and conditions available. The board of governors may also want to look at advice provided by other relevant bodies such as the Foundation Trust Network.

The nominations committee and, where appropriate, the governors’ working group may also wish to consult with the NHS foundation trust’s remuneration committee during this process.

Involving the remuneration committee

Although the remuneration committee is generally concerned with setting the pay of the executive directors and other employees, it may be able to provide useful input on matters such as the process, terms and conditions available at comparable organisations, trusted and experienced advisers and relevant performance indicators that may be applicable to both executive and non-executive directors.

As the remuneration committee is generally composed of non-executive directors, governors should bear in mind potential conflicts of interest may arise when involving the remuneration committee. By focusing the advice of the remuneration committee on process and use of external advisers, conflicts of interest can be successfully managed.
When should terms and conditions be reviewed or changed?

It may be necessary to change the terms and conditions of the existing chair. Changes to existing terms and conditions will need to be handled carefully and legal advice may need to be taken. This is because a poorly run process may lead to disputes and potential litigation.

- **When market conditions change**
  A significant change in market conditions may mean existing terms and conditions should be reviewed. Regardless of significant change, governors should consult external professional advisers to market-test the pay levels and the other terms and conditions of the chair at least once every three years.

- **When responsibilities change**
  There may be a marked change in the range of the chair’s responsibilities or in their time commitment to the role. The governors should take the lead in conducting a review of the chair’s terms and conditions in light of any such change. Where there is to be a significant change in those terms and conditions, particularly with regards to pay, external professional advice (including legal advice) should be sought before any changes are made.

Who triggers the review?

As governors have the statutory duty to decide the remuneration and other terms and conditions of the non-executive directors, the board of governors should determine whether a review is required. This should be an informed decision, made with the advice and support of bodies such as the NHS foundation trust’s HR specialists and external professional advice (where market conditions have changed), or the chief executive (where responsibilities have changed).

How will the final decision be made?

Any new or changed set of terms and conditions of the chair will require a decision by the board of governors at a general meeting. This meeting should be informed by a report (including recommendations) of either the nominations committee or, where appropriate, the governors’ working group.

In relation to a new appointment, the revised terms and conditions should form part of the appointment decision.

There should be full transparency in relation to the terms and conditions in the NHS foundation trust’s annual report.
Section three: removing the chair

Removing the chair will be a very serious step and the board of governors must follow a fair, rigorous, lawful and transparent process in order to take it.

What are the possible reasons for removal?

Governors will appreciate that removing the chair is only likely to be appropriate in very limited circumstances and will depend on the particular nature of those circumstances. However, governors must clearly understand the reasons which may lead to a removal decision before embarking on the removal process.

Likely circumstances where removal should be considered include, but are not limited to:

- gross misconduct on the part of the chair;
- the chair losing the confidence of the board of directors or governors; or
- the NHS foundation trust being in serious breach of its terms of authorisation and the chair is judged as being accountable for the breach.

What is the process for removal?

The board of governors should only exercise its power to remove the chair as a last resort.

The removal should not take place unless the governors, the chief executive and other non-executive directors have had the opportunity to put forward their views on the basis of the available evidence. A suggested process is set out in figure 8 below.

Have you considered?

- What options are available internally before starting a formal removal process.
- How communications would be managed in such a situation.
Vote of no confidence
The first step is likely to be a vote of no confidence in the chair by a majority of the board of governors. This will not in itself result in the removal of the chair, but will start the formal process for the removal.

Before the confidence vote, the board of governors should discuss the matter with the chief executive, the other non-executive directors, and in particular the senior independent director. However, the decision on whether to hold a confidence vote is one for the board of governors.

When a vote of no confidence is proposed, the lead governor should directly inform Monitor, via the NHS foundation trust’s relationship manager.

Investigation, advice and consultation
The nominations committee, with appropriate representatives from the board of governors, should then investigate the matter, including any allegations made against the chair. The NHS foundation trust may decide that an independent investigation is warranted under certain circumstances and this should be determined by the trust alone.

This investigation should include consideration of the views of key personnel within the NHS foundation trust, including the non-executive directors. Additional weight should be given to the views of the independent non-executive directors and particularly the senior independent director.

Legal advice on the legality of any removal and the process for it should be sought throughout.

Suspension
The board of governors may wish to consider whether it can and should suspend the chair while the process is followed. This may be considered appropriate in circumstances such as:

- where a potential risk to patients or staff exists;
- if it is deemed that an individual may disrupt an investigation; or
- if there is an allegation of fraud.

Legal advice may need to be sought on whether there is a power to suspend, whether suspension is appropriate and the terms (including the length) of any suspension prior to any such decisions being taken.

Report
A senior representative of the nominations committee should then present the findings of the investigation and consultation to the board of governors.

Throughout the process, the chair must be given an adequate opportunity to respond to the allegations made against them.
How will the final decision be made?

If the board of governors is content that a full and proper process has been followed, it should call for a full meeting of the board of governors and vote on the matter. If it is in any doubt about the process, it should seek clarification and remedy any deficiencies before voting.

Removal of the chair requires the approval of three-quarters of the members of the whole board of governors and not just those who attend the meeting.

What happens when Monitor removes a chair?

There may be circumstances when, following a significant breach of an NHS foundation trust’s terms of authorisation, Monitor exercises its statutory powers to suspend or remove a chair. Under such circumstances, Monitor’s statutory powers take precedence over the powers that may be exercised by the board of governors.

For further information on Monitor and how it may exercise its powers, governors can refer to the Compliance Framework available on Monitor’s website.

What are the next steps following removal?

In the event that removal takes place, a new appointment will need to be made. A description of the reasons for, and process of, removal will need to be set out in the NHS foundation trust’s next annual report.
The non-executive directors provide independence, balance and challenge to the executive element of the board of directors.

This chapter sets out some of the key issues that governors will need to consider in relation to the non-executive directors.

Issues that we will look at in this chapter include:

• appointment of a non-executive director;
• terms and conditions; and
• removing non-executive directors.
What are the legal requirements?

The legislation requires that an NHS foundation trust has non-executive directors. The number of non-executive directors will be set out in the NHS foundation trust’s constitution.

Appointment and removal

The legislation says:

“It is for the board of governors at a general meeting to appoint or remove the...non-executive directors”.

Therefore, it is for the board of governors as a whole (rather than, say, a committee or a working group) to appoint or remove the non-executive directors.

In accordance with the legislation:

• appointment is by a majority of the governors attending the relevant meeting; and

• removal requires the approval of three-quarters of the members of the board of governors, not just those who attend the meeting.

Terms and conditions

The legislation says:

“It is for the board of governors at a general meeting to decide the remuneration and allowances, and the other terms and conditions of office, of the non-executive directors”.

Therefore, the board of governors is not only responsible for appointing the non-executive directors; it also sets the terms of those appointments.
What other responsibilities are there?

Best practice (as set out in the *Code of Governance* and elsewhere) means that governors should perform specific additional tasks in relation to the non-executive directors.

Annual performance appraisal

Conduct of performance appraisals and then reviewing the results will significantly assist the board of governors in performing its statutory duties in respect of the potential re-appointment or removal of the non-executive directors. The board of governors should take the lead on agreeing a process for the evaluation of the non-executives which should consider carefully the performance against pre-defined objectives that support the delivery of the trust’s forward plan.

The actual appraisals of the non-executive directors will be led by the chair. The outcome of the evaluations should then be agreed by the governors.

Senior independent director

The appointment of the senior independent director is made by the board of directors, in consultation with the board of governors. Further detail in relation to the senior independent director can be found in the *Code of Governance*. 
Section one: appointing a non-executive director

As with the chair, the governors will need to do a considerable amount of work to ensure that the other non-executive directors are fit and proper persons for the NHS foundation trust.

General considerations

Further detail in relation to the role of a non-executive director is given in the Code of Governance. Governors should read this carefully before embarking on an appointment or re-appointment process.

As with all appointments, the procedure for appointment or re-appointment must be formal, rigorous and transparent. The appointment must be based on merit and objective criteria, and the process should be described in the NHS foundation trust’s annual report.

As part of the process, the governors should consider the relevant aspects of the NHS foundation trust’s constitution and the Code of Governance, such as:

- the requirements of the NHS foundation trust’s constitution in respect of the number of non-executive directors;
- the independence of non-executive directors;
- any specific skills and experience requirements such as the need to ensure relevant and recent financial experience when appointing non-executive directors to the audit committee; and
- the balance of executive and non-executive (and in particular independent non-executive) directors on the board of directors.

Triggers for action

The most common trigger for action will be the impending expiry of an existing non-executive director’s term. The non-executive director may decide to seek re-appointment, in which case a decision will need to be made as to whether this is in the best interests of the NHS foundation trust and should happen. If re-appointment is not sought, or it is decided that it is not appropriate to re-appoint, a new appointment will need to be made.

Governors also have the power to remove an existing non-executive director. If a non-executive director is removed in this way, again, a new appointment may need to be made.
Deciding on a process

The governors should agree with the nominations committee a clear process for the nomination of a new appointment or the re-appointment of an existing one. This process should include taking appropriate advice from within the NHS foundation trust, such as from the trust’s own HR department.

Where there is a specific nominations committee in respect of the non-executive directors, then the board of governors should agree a process with that committee. Where only one nominations committee exists, the board of governors should appoint a working group, headed by the lead governor if such a position exists within the trust, to agree the process with the nominations committee and to report back to the board of governors.

In either case, the nominations committee should decide a job description and person specification defining the role and capabilities required, including an assessment of the time commitment expected for the role. Terms and conditions for the post should be proposed and, if appropriate, the post should be advertised. These matters should be agreed with the governors’ working group where there is one.

The nominations committee, and where appropriate the governors’ working group, should take into account the views of the board of directors on the process in general and the qualifications, skills and experience required for the position. For example, if the directors advise that the board of directors is lacking specific professional experience (e.g. legal, clinical or accountancy), this should be fed into the recruitment process. In the same way and as appropriate, the nominations committee should consult other key stakeholders.

Temporary appointments

When appropriate forward plans are in place, temporary arrangements are likely to occur only in exceptional circumstances. However, under such circumstances such as the vacancy occurring at short notice, the governors may need to consider whether a temporary appointment needs to be made while the formal appointment process is being run.
What if re-appointment is sought?

Where an existing non-executive director seeks re-appointment, the nominations committee and, where appropriate, the governors’ working group should look at the existing candidate against the current job description and person specification for their role at the NHS foundation trust. This job description should be reviewed on an ongoing basis by the nominations committee. In addition, the following matters may be relevant.

Annual performance appraisals

In relation to non-executive directors, consideration should be given to the candidate’s past performance at the NHS foundation trust. The chair should confirm to the governors that, following formal performance evaluation, the performance of the individual non-executive director proposed for re-appointment continues to be effective and demonstrates commitment to the role.

Independence

Any changes in the independence (as described in the Code of Governance) of the non-executive director should be taken into account.

Commitments

Any changes in the candidate’s other significant commitments will be relevant. The new position in respect of commitments should be compared against the time commitment expected.

Refreshing the board of directors

Refreshment of the board of directors provides an opportunity to reassess the skills, knowledge and experience required by the NHS foundation trust. It ensures the board of directors is exposed to new approaches, experiences and ways of working. It is healthy for the NHS foundation trust to refresh the board of directors and this includes the non-executive directors.

Terms

The re-appointment, if it happens, should be for a specified term of no longer than three years. Any candidate that has served six years or more should be rigorously reviewed and the process should take into account the need for progressive refreshing of the board of directors.

A non-executive director may serve longer than nine years, subject to annual re-appointment. In the case of a non-executive director, the length of service is relevant to the determination of his or her independence in accordance with the Code of Governance.

Once these processes have been undertaken, the re-appointment can be put to the board of governors for a final decision (see figure 9 on page 37).
What if a new appointment needs to be made?

If a non-executive director does not seek re-appointment on their current term expiring, their re-appointment is not approved or they are otherwise removed by either the board of governors or Monitor (where, following Monitor’s intervention, the board of governors is left to make an appointment), the NHS foundation trust may need to seek a new appointment.

Whether or not a new appointment is required will depend on the NHS foundation trust’s constitutional requirements and the needs of the NHS foundation trust. This issue should be discussed with the board of directors and, in particular, with the chair.

A new appointment will mean, of course, that reliance on previous internal performance evaluations will not be possible. As a result, the appointment process will need particular scrutiny and the board of governors should take the lead in ensuring that a well-defined and robust recruitment process is in place. In many cases, it will be appropriate to take external recruitment advice.

Getting the right external advice

The board of governors is likely in many cases to decide that, in addition to the advice and support offered by the trust’s own HR specialists, taking external advice on recruitment and search is appropriate. Typical reasons include where there is limited experience of senior recruitment within the governor group or where tough employment market conditions prevail.

When selecting external advisers, governors should consider matters including the potential advisers’:

- previous experience of board level recruitment;
- independence from the NHS foundation trust;
- track record of successful appointments;
- previous experience of public sector recruitment;
- knowledge of the health sector and candidate research ability; and
- selected principles and processes, such as candidate assessment techniques.

Applications

The nominations committee with input, where appropriate, from a governors’ working group and other key stakeholders may need to sift through the applications received for the post following its advertisement. The precise nature of this sifting will depend upon the circumstances in which the vacancy arose, the number of applications received and of candidates that are potentially appointable. The sifting process should seek to produce a diverse field of strong candidates for interview. Again, this may require external assistance, for example, from a recruitment consultant.

The nominations committee (with input from the other non-executive directors and the governors’ working group where there is one) should then put together a shortlist of no fewer than two candidates, with three or four candidates being the ideal number.
Interview

NHS foundation trusts should ensure there is majority governor representation on the interview panel. Typically, the nominations committee, with participation, where appropriate, from the governors’ working group, will interview the shortlisted candidates. An assessment should then be made as to which of the shortlisted candidates are appointable.

The appointable candidates are then put forward to the board of governors for the final decision on appointment.

Typically, a final report should be presented, incorporating the proposal for re-appointment or the presentation of new candidates, to the board of governors for consideration. The report should summarise the process followed by the nominations committee, including the selection criteria where appropriate.

The report should then describe how, and to what extent, the candidates meet the criteria for the role, their relative strengths and weaknesses and a recommendation on how the board of governors should proceed.

How will the final decision be made?

The board of governors must then make an appointment decision in accordance with its statutory obligations. As part of this, the board of governors will consider the issues set out in the report and any other factors it considers relevant. In particular, it should satisfy itself that all applicable law and advice has been complied with, the process followed was legal and appropriate and that the proposed appointee has the right qualities to meet the job description for the role.

The board of governors should consult the board of directors (particularly the other non-executive directors) before the final decision is made.

Once the appointment decision is made, the chair and the governors should set the appointee objectives for the coming year.

The full process followed should be described in the NHS foundation trust’s annual report.

Have you considered?

• The potential use of independent assessors on the panel.
• The material available to support the process on the Appointments Commission’s website.
• What level of involvement directors should have during the process.
Section two: terms and conditions of the non-executive directors

A significant factor in attracting, retaining and motivating non-executive directors will be the terms and conditions, including the levels of pay, on offer to them. This section provides advice on how governors should strike the right balance.

What do the terms and conditions consist of?

The terms and conditions will form the non-executive director’s appointment with the NHS foundation trust. They will cover a variety of issues, the most important of which will include:

- the term that the non-executive director will serve;
- the responsibilities of the non-executive director;
- the remuneration and allowances that the non-executive director will receive. This will include any pay that the individual receives, but can also include non-taxable amounts;
- the location of work;
- the hours of work expected; and
- termination provisions including notice periods.

The most common point at which the terms and conditions of a particular non-executive director are set is on their appointment. However, the terms and conditions can be reviewed and altered throughout the non-executive’s term at the NHS foundation trust, provided the correct processes are followed.

How should the process work?

There should be a transparent procedure for deciding the terms and conditions of individual non-executive directors.

The terms and conditions in relation to a new appointment will be set by the nominations committee and agreed, where appropriate, with the governors’ working group prior to the appointment being made. However, it must be remembered that the board of governors as a whole will be making the ultimate decision on the relevant appointment’s terms and conditions at a general meeting and it could choose to reject the proposals.

With respect to existing appointments, again, it is the board of governors as a whole that makes the final decision on any revised terms and conditions.
New appointments – how do governors meet their responsibilities?

Governors will be aware that all money paid to non-executive directors is taxpayers’ money – an NHS foundation trust should ensure that value for public money is obtained.

The nominations committee and, where appropriate, the governors’ working group should agree the process for setting terms and conditions as part of the overall appointments process. This should be done after the job description has been finalised but before the post is advertised.

The factors that the nominations committee, (where appropriate) the governors’ working group and, eventually, the board of governors will need to examine will vary depending on the position. However, central factors will be:

- the time commitment required by the role;
- the responsibilities covered by the role; and
- the terms and conditions available at similar NHS foundation trusts and other comparable organisations.

In addition to the advice and support available from the NHS foundation trust’s own HR specialists, professional advice may need to be taken, particularly on prevailing terms and conditions. The board of governors may also want to look at advice provided by other relevant bodies such as the Foundation Trust Network.

The nominations committee and, where appropriate, the governors’ working group may also wish to consult with the NHS foundation trust’s remuneration committee during this process.

Involving the remuneration committee

Although the remuneration committee is generally concerned with setting the pay of the executive directors and other employees, it may be able to provide useful input on matters such as the process, terms and conditions available at comparable organisations, trusted and experienced advisers and relevant performance indicators that may be applicable to both executive and non-executive directors.

As the remuneration committee is generally composed of non-executive directors, governors should bear in mind potential conflicts of interest may arise when involving the remuneration committee. By focusing the advice of the remuneration committee on process and use of external advisers, conflicts of interest can be successfully managed.
When should terms and conditions be reviewed or changed?

It may be necessary to change the terms and conditions of an existing non-executive director, or a group of non-executive directors. Changes to existing terms and conditions will need to be handled carefully and legal advice may need to be taken. This is because a poorly run process may lead to disputes and potential litigation.

- **When market conditions change**
  A significant change in market conditions may mean existing terms and conditions should be reviewed. Regardless of significant change, governors should consult external professional advisers to market-test the pay levels and the other terms and conditions of the non-executive directors at least once every three years.

- **When individual responsibilities change**
  There may be a marked change in the range of an individual’s responsibilities or in their time commitment to the role. The governors should take the lead in conducting a review of the non-executive director’s terms and conditions in light of any such change. Where there is to be a significant change in those terms and conditions, particularly with regards to pay, external professional advice (including legal advice) should be sought before any changes are made.

Who triggers the review?

As governors have the statutory duty to decide the remuneration and other terms and conditions of the non-executive directors, the board of governors should determine whether a review is required. This should be an informed decision, made with the advice and support of bodies such as the trust’s HR specialists and external professional advice (where market conditions have changed), or the chair (where individual responsibilities change).

How will the final decision be made?

Any new or changed set of terms and conditions of the non-executive directors will require a decision by the board of governors at a general meeting. This meeting should be informed by a report (including recommendations) of either the nominations committee or where appropriate, the governors’ working group.

In relation to a new appointment, the revised terms and conditions should form part of the appointment decision.

There should be full transparency in relation to the terms and conditions in the NHS foundation trust’s annual report.
Section three: removing non-executive directors

As with the removal of a chair, governors should ensure there is a rigorous, lawful and transparent process in place.

What are the possible reasons for removal?
Governors will appreciate that the removal of a non-executive director is only likely to be appropriate in limited circumstances.

Possible reasons for the removal (for example, gross misconduct or a request from the board of directors for the removal of a particular non-executive director) will depend on the particular circumstances. However, the governors must clearly understand the potential reasons which may lead to a removal decision before embarking on a removal process.

What is the process for removal?
The board of governors should only exercise its power to remove a non-executive director as a last resort.

The removal should not take place unless the governors and the other non-executive directors (in particular the chair and senior independent non-executive director if he or she is not the subject of the process) have had the opportunity to put forward their views on the basis of the available evidence.

A suggested process is set out below.

Vote of no confidence
The first step is likely to be a vote of no confidence in the individual by a majority of the board of governors. This will not in itself result in the removal of that individual, but will start the formal process for the removal.

Before the confidence vote, the board of governors should discuss the matter with the other non-executive directors, and in particular the chair and the senior independent director. However, the decision on whether to hold a confidence vote is one for the board of governors.

Investigation, advice and consultation
The nominations committee, with appropriate representatives from the board of governors, should then investigate the matter, including any allegations made against the individual. The trust may decide that an independent investigation is warranted under certain circumstances and this should be determined by the trust alone. This investigation should include consideration of the views of key personnel within the NHS foundation trust, including the chair. Additional weight should be given to the views of the independent non-executive directors and particularly the senior independent director (where he or she is not the individual under scrutiny).

Legal advice on the legality of any removal and the process for it should be sought throughout.

Have you considered?
• What options are available internally before starting a formal removal process.
• Identifying in advance likely timescales, actions and responsibilities, to ensure participants have clarity regarding the process.
• The likely communications handling strategy required, particularly if the matter is sensitive.
Suspension
The board of governors may wish to consider whether it can and should suspend the relevant non-executive director while the process is followed. This may be considered appropriate in circumstances such as:

- where a potential risk to patients or staff exists;
- if it is deemed that an individual may disrupt an investigation; or
- if there is an allegation of fraud.

Legal advice will need to be sought on whether there is a power to suspend, whether suspension is appropriate and the terms (including the length) of any suspension.

Report
A senior representative of the nominations committee should then present the findings of the investigation and consultation to the board of governors. The board of governors must ensure all individuals are given an adequate opportunity to respond to any allegations made.

How will the final decision be made?
If the board of governors is content that a full and proper process has been followed, it should vote on the matter. If it is in any doubt about the process, it should seek clarification and/or remedy any deficiencies before voting.

Removal of a non-executive director requires the approval of three-quarters of the members of the whole board of governors.

What happens when Monitor removes a non-executive director?
There may be circumstances when, following a significant breach of an NHS foundation trust’s terms of authorisation, Monitor exercises its statutory powers to suspend or remove a non-executive director. Under such circumstances, Monitor’s statutory powers take precedence over the powers that may be exercised by the board of governors.

For further information on Monitor and how it may exercise its powers, governors can refer to the Compliance Framework available on Monitor’s website.

What are the next steps following removal?
In the event that removal takes place, the NHS foundation trust will need to consider whether or not a new appointment needs to be made to replace the removed director.

A description of the reasons for and process of removal will need to be set out in the NHS foundation trust’s next annual report.
5 Approving the appointment of the chief executive

This chapter looks at the role of governors in relation to the appointment of the chief executive of an NHS foundation trust.

Issues that we will look at in this chapter include:

- factors to consider when making a decision to approve; and
- what to do if approval is not given.
What are the legal requirements?

The legislation says:

“The appointment of a chief executive requires the approval of the board of governors”.

It is important to note that this does not mean that the board of governors appoints the chief executive.
What does “approval” mean?

It is for the non-executive directors (including the chair) to appoint or remove the chief executive. However, the board of governors has to approve that decision and, therefore, can veto the appointment of a particular chief executive.

The Code of Governance says that approval by the board of governors of the appointment of a chief executive should be a subject of the first general meeting of that board following the appointment by a committee of the chair and non-executive directors. Approval therefore can be given by a majority of those governors attending the meeting.

The process would be for non-executive directors to put forward a candidate for appointment and for the board of governors to decide whether to approve that appointment. The board of governors may decide not to approve the candidate. It is envisaged that such a situation will be rare and sound (including legally sound) reasons are required for this.

Timescales

As the Code of Governance indicates that approval by the board of governors should be the subject of the first general meeting following the appointment, careful management of the timings of the appointment process will be key.

Typically the board of governors meet as a full council four or five times a year (Source: Survey of NHS Foundation Trust governors). This may mean a delay of two to three months between the decision to appoint and the general meeting of the governors at which approval is discussed. By managing the appointment process in advance and keeping governors informed of the likely timescales, delays can be reduced or eliminated.

What factors should the governors look at before making a decision?

This will depend on the circumstances. However, there are three main areas for the board of governors to consider.

Law and guidance

Governors should satisfy themselves that non-executive directors have complied with the NHS foundation trust’s constitution and other relevant guidance such as the Code of Governance when appointing a chief executive.

Process

Governors should consider the appointment process followed by non-executive directors. They must ensure they are satisfied with the various stages of the appointment process such as use of advertisements, the criteria for selection and how selection was carried out. Involvement of governors in the selection process will result in the board of governors having a clearer understanding of how the process worked.

Proposed candidate

Governors should be content that the appointment process has identified a candidate with sufficient experience to fulfil all essential aspects of the job description.

Have you considered?

• Seeking governor approval on the appointment process in advance, to reduce delays after the appointment decision has been taken.
• The potential for using delegated authority to reduce delays.

Have you considered?

• What advice should be sought from the NHS foundation trust’s own HR or legal teams.
• What training and support can be provided to governors embarking on this process.
• The benefits of additional governor involvement in the process, to reduce the likelihood of approval not being granted.
The board of governors should expect a full report, bearing in mind the need to respect candidate confidentiality, from the non-executive directors or appropriate committee regarding the above matters. Nonetheless, the board of governors must recognise that the primary appointment obligation is on the non-executive directors in accordance with their own legal obligations in this regard. As such, the board of governors should not withhold approval lightly.

If approval is withheld, the board of governors must set out their reasons to the chair and the other non-executive directors. The reasons for withholding approval must be justifiable as there are likely to be financial consequences.

Reducing the likelihood of governors not giving approval

By communicating with governors and involving them throughout the appointment process, the likelihood of governors withholding approval can be reduced. The figure below illustrates some steps taken by NHS foundation trusts when appointing a new chief executive to improve governor understanding and involvement in the appointment process.

<table>
<thead>
<tr>
<th>Law</th>
<th>Process</th>
<th>Candidate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governors are informed of constitutional requirements in advance of the process commencing.</td>
<td>Governors are given the option of pre-approving the process for appointment. Governors are involved in the appointment process to provide their perspective to the board of governors when considering approval of the final candidate.</td>
<td>The report demonstrates fully how the proposed candidate’s skills and experience met the agreed role and person specification. Governors involved in the process can directly communicate their opinions to the board of governors, providing an alternative source of information.</td>
</tr>
</tbody>
</table>

Figure 10 Options employed by NHS foundation trusts to increase governor involvement in the appointment process

What if the board of governors does not give approval?

It is incumbent on both the non-executive directors and the board of governors to work together to break any deadlock, with concerns communicated at the earliest possible stage.

It will be open to the non-executive directors to put forward again the same candidate for approval by the board of governors. This may be with further assurances in relation to any concerns that the board of governors previously expressed in refusing approval.

Alternatively, the non-executive directors may decide to seek a new candidate for appointment and approval by the board of governors.

The process, the decision and the reasons for that decision should be set out in the NHS foundation trust’s annual report, whatever the outcome.

Have you considered?

What mediation services are available in a deadlock situation.
The governors and the NHS foundation trust’s auditor

The auditor of an NHS foundation trust has important duties in relation to the foundation trust’s annual accounts. This chapter sets out the governors’ role in relation to the auditor. Note that this chapter relates to the NHS foundation trust’s external, not internal, auditor.

Issues that we will look at in this chapter include:

• what the auditor does;
• who the auditor can be; and
• appointing and removing the auditor.
What are the legal requirements?

Governors will need to undertake a considerable amount of work to ensure that the right auditor is in place and that an auditor will perform effectively.

The legislation says that the NHS foundation trust must have an auditor. The board of governors’ role is set out as follows:

“It is for the board of governors to appoint or remove the auditor at a general meeting of the board”.

Therefore, the board of governors as a whole (rather than, say, a committee or a working group) appoints or removes the auditor.
The role of the audit committee

The audit committee is responsible for monitoring and reviewing matters such as the integrity of financial statements of the NHS foundation trust, the NHS foundation trust’s internal financial controls and the internal audit function.

The audit committee must consist of non-executive directors. The Code of Governance states that the committee should have at least three independent non-executive directors and that at least one member of the audit committee should have recent and relevant financial experience.

What other responsibilities are there?

In order to support the underlying statutory duty, the Code of Governance states that the audit committee should report to the board of governors, identifying any matters where it considers that action or improvement is needed.

The report should also make recommendations as to the steps to be taken. The governors will need to consider such reports closely, particularly with regards to holding directors to account for trust performance.

The governors will also want to look at The Audit Code for NHS Foundation Trusts (“Audit Code”) and, in particular, the criteria for auditors set out in the code.

The Audit Code is guidance that must be followed, as per the terms of authorisation for every NHS foundation trust.

What does the auditor do?

The auditor has statutory duties in auditing the accounts of an NHS foundation trust. These involve ensuring that:

- the accounts are prepared in accordance with all relevant directions set by Monitor and any other statutory provisions;
- proper practices have been observed in the compilation of the accounts; and
- the NHS foundation trust has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources.

Further details on the auditor’s role are set out in Monitor’s document, the Audit Code.

Have you considered?

If governors attending the audit committee during the auditor selection process would help build skills and experience in this area.
Who can be the auditor?

On authorisation as an NHS foundation trust, the auditor appointed by the Audit Commission to the predecessor NHS trust will continue to be appointed until the board of governors has had an opportunity to discuss the matter.

An engagement letter must therefore be agreed between the NHS foundation trust and the incumbent auditors for that interim period so that there is not a period during which the NHS foundation trust has no auditor in place. Thereafter, the NHS foundation trust is free to appoint whichever auditor it considers to be the most appropriate.

The auditor can either be an individual, from a firm of auditors or an officer of the Audit Commission. However, the auditor (or in the case of a firm, each of its members) must be a member of one of a list of specified professional bodies set out in legislation. This is included in the box on the left.

In addition, the Audit Code includes particular criteria that the auditor must be able to demonstrate that it meets, not only on appointment but throughout its term as auditor. The auditor must:

- have an established and demonstrable standing within the healthcare sector and be able to show a high level of experience and expertise. The work is of a specialised nature, and so general audit experience is not sufficient;
- comply with the Audit Code; and
- subject the audit to internal quality control procedures that are sufficiently robust to monitor the compliance of the audit work with the Audit Code.

If the auditor fails to meet, or has cause to believe that it will not be able to comply with, the criteria set out in the Audit Code at any point during its appointment, the auditor must resign.

Consideration should be given to whether the team at the auditor’s firm should be changed. A team that has been in place for too long may no longer be able to perform its role to the requisite standard of independence from the NHS foundation trust. To assist governors in determining rotation criteria, advice could be sought from the Audit Practices Board (APB).

The APB Ethical Standard 3 requires audit firms to put in place arrangements to ensure that:

- no individual acts as audit partner or quality review partner for more than seven years. Where an individual remains in this position for more than five years the reasons for this must be clearly stated to the Board of Governors; and
- staff in senior positions do not work on the audit team for more than seven years.

Annual process

The audit committee should make a report to the board of governors in relation to the auditor.

Such a report should be made after the completion of the annual audit and should assess the auditor’s work and fees to ensure that the work is of a sufficiently high standard and the fees are reasonable.

The audit committee must make a recommendation to the board of governors with respect to the retention of the auditor. The board of governors should then consider whether it may be appropriate to remove the auditor.
Section one: appointing the auditor

What is the trigger for action?
The most common trigger for action will be the impending expiry of the existing auditor’s contract term. With this, a new appointment process will need to be undertaken, whether or not the existing auditor is seeking re-appointment.

Governors also have the power to remove an existing auditor and, in certain situations, an auditor can or should resign. If either event occurs, then a new appointment will need to be made.

What are the over-arching principles?
As with all appointments, the procedure for appointment (or re-appointment) must be formal, rigorous and transparent. The appointment must be based on merit and objective criteria and the process should be described in the NHS foundation trust’s annual report.

Deciding on a process
The board of governors should take the lead in agreeing with the audit committee the criteria for appointing, re-appointing or removing auditors.

Initial steps
Once the criteria have been established, the audit committee will drive the process in the first instance. However, the final decision on any appointment rests with the board of governors.

The audit committee should agree with the board of governors a clear process for the nomination of a new auditor or the re-appointment of an existing one. The board of governors should set up an audit working group made up of governors to liaise with the audit committee.

The audit committee should then prepare a specification defining the role and capabilities required. This should be agreed with the governors’ audit working group.

Procurement process
Once the audit committee (in consultation with the board of governors or the working group) has decided on the qualifications, skills and experience required of the auditor, it should run a formal procurement process to obtain the best candidate in the most fair and transparent manner possible.

The exact form of the procurement process will vary depending on the NHS foundation trust. It will be in accordance with the NHS foundation trust’s own procurement rules and must be within procurement law. Procurement law is complex and the audit committee and the governors’ audit working group are likely to need legal advice before embarking on a new procurement process.

Even if the existing auditor is seeking re-appointment, they must be treated in the same way as all other candidates for the role. The same criteria should be applied to all those that express an interest in becoming the auditor of the NHS foundation trust.
Shortlist

The audit committee should decide on a shortlist of at least two appointable candidates. This shortlist should be considered in conjunction with the governors’ audit working group.

Re-appointment

Provided the correct process is followed and the appropriate criteria are met, the existing auditor may be on the final shortlist of candidates.

Presentation by the audit committee

The audit committee and the governors’ audit working group should present to the board of governors, setting out:

- the procurement process that it has followed;
- the results of the procurement process; and
- recommendations.

The recommendations should include a full description of the shortlisted candidates and an assessment of the relative strengths and weaknesses of those candidates.

In addition, as part of its recommendations, there should be proposals in respect of the terms of engagement of the external auditor.

How will the final decision be made?

The board of governors should then make a decision in accordance with its statutory obligations.

If the board of governors makes an appointment, the terms of engagement of the auditor will need to be approved by the audit committee. In particular, the board of governors and the audit committee should consider for how long the appointment should last. Best practice is to appoint an auditor for a period which allows it to develop a strong understanding of the NHS foundation trust. The norm will be a three to five year appointment.

In the event that the board of governors does not feel able to make an appointment, for example because it is not willing to accept the recommendations made to it or it believes that the procurement process was flawed or otherwise, then the matter will revert back for further consideration and action by the audit committee and the governors’ audit working group. The NHS foundation trust must have an auditor. As such, the speed of the process must reflect this statutory requirement and therefore the timelines of the particular appointment process should be adhered to. Consideration may be required as to extending the incumbent auditor’s contract in order to ensure that the NHS foundation trust does have an auditor at all times.

In all cases, the full process must be set out in the NHS foundation trust’s annual report. In particular, if the board of governors does not accept the audit committee’s recommendation, the board of directors should include in the annual report a statement from the audit committee explaining the recommendation and the reasons why the board of governors took a different position.
Section two: removing the auditor

Removing the auditor will be a very serious step and the board of governors must follow a rigorous and transparent process in order to take it. This section does not apply to situations where the audit contract has expired.

What are the possible reasons for removal?
The board of governors will recognise that removal of the auditor is only likely to be appropriate in limited circumstances, particularly as the auditor has a significant independent role within the NHS foundation trust.

Possible reasons for the removal will depend on the circumstances. A key point the governors will need to look at is whether the auditor continues to meet the criteria set out in the Audit Code. If the auditor does not meet these criteria, there may be grounds for the removal of the auditor.

The governors must, of course, clearly understand the reasons for potential removal before embarking on the removal process.

What is the process?
The board of governors should only exercise its power to remove the auditor after exhausting all other means of resolving any dispute. If it is not possible to resolve the issue, then a suggested process is set out below.

Proposal
The first step should be a proposal to consider removal by the board of governors. This will not in itself result in the removal of the auditor, but will start the formal process of removal.

Investigation, advice and consultation
The audit committee should investigate the matter, including, where appropriate, any allegations made against the auditor.

The investigation should include consideration of the views of key personnel within the NHS foundation trust, including the NHS foundation trust’s finance director and his/her staff.

Legal advice on the legality of any removal and the process for it should be sought throughout.

Report
The audit committee should present the findings of the investigation and consultation to the board of governors. The board of governors must ensure that auditors are given adequate opportunities to respond to any allegations made.

Have you considered?
The timing of any decision to remove the auditor to avoid inconveniencing the trust.
How will the final decision be made?

If the board of governors is content that a full and proper process has been followed, it should vote on the matter. If there is any doubt whatsoever in relation to the process, the board of governors must seek clarification and remedy any deficiencies before voting.

Removal requires the approval of a majority of the board of governors at a general meeting.

What are the next steps following removal?

When the board of governors ends an auditor’s appointment in disputed circumstances, the chair of the NHS foundation trust should write to Monitor informing it of the reasons behind the decision. In all cases of removal, the NHS foundation trust will need to appoint a new auditor.

The removal process and the reasons for it will need to be set out in the NHS foundation trust’s annual report.
Receiving the NHS foundation trust’s annual accounts, any report of the auditor on them, and the annual report

In order to keep the board of governors informed of what is going on at the NHS foundation trust, certain documents must be presented to it.

This chapter looks at what documents should be provided to the board of governors as a minimum and to meet the statutory requirements.

Issues that we will look at in this chapter include:

• the role of the governor in receiving these documents; and
• internal feedback requirements.
What are the legal requirements?

The legislation states:

“The following documents must be presented to the board of governors… at a general meeting:

(a) the annual accounts,
(b) any report of the auditor on them; and
(c) the annual report”.

The NHS Foundation Trust Financial Reporting Manual (“Financial Reporting Manual”) indicates this will be at the annual general meeting of the board of governors.
What are these documents?

Further detail in relation to the annual report and accounts of an NHS foundation trust (including any report of the NHS foundation trust’s auditor in relation to the accounts) can be found in the Financial Reporting Manual available on Monitor’s website.

General

The annual report and accounts must be formally approved by the board of directors. Once they have been approved, the auditor will sign its opinion on the accounts (in accordance with the Audit Code). The auditor will need to see the annual report prior to signing its opinion.

NHS foundation trusts are required to lay their annual report and accounts (with any report of the auditor on them) before Parliament. The Financial Reporting Manual sets out a timetable for this.

Accounts

The NHS foundation trust must keep accounts, prepare in respect of each financial year annual accounts and comply with any directions given by Monitor in respect of certain aspects of those accounts.

Have you considered?

Distributing additional advice on accounts to governors such as the HFMA/Audit Commission publication Foundation Trust Accounts: A Guide for Non-Executives and Governors.

Figure 11 Timescales for the production of the annual report and accounts
**Auditor’s report on the accounts**
When the auditor has concluded its audit of the accounts, it must enter on the accounts:

- a certificate that it has completed the audit in accordance with the applicable legislation; and
- an opinion on the accounts.

The certificate and opinion should be addressed to the board of governors. The certificate must confirm that the audit has been completed in accordance with the requirements of the legislation. If the auditor has completed the audit in accordance with these requirements but has been unable to satisfy itself in relation to certain of the matters set out in the Audit Code, it must state this in the certificate by qualifying the certificate.

**Annual report and accounts**
The Financial Reporting Manual sets out the requirements for the content and format of the annual report and accounts.

The accounts will include:

- a statement of the accounting officer’s responsibilities;
- a statement on internal control;
- auditor’s opinion;
- main statements; and
- notes.

As a minimum, the annual report will include:

- a directors’ report including a management commentary;
- a remuneration report;
- the disclosures set out in the Code of Governance; and
- other disclosures in the public interest.

In addition, the annual report must include a report on the quality of care the NHS foundation trust provides. The quality report contains a quality narrative, incorporating a statement signed by the chief executive outlining the current position on quality and the priorities for improving quality within the trust. In addition to the quality narrative, the report summarises the trust’s performance against quality indicators selected by the trust in three key areas:

- patient safety;
- clinical effectiveness; and
- patient experience.

Further details in relation to all of these matters are set out in the Financial Reporting Manual and governors are encouraged to read this.
Quality accounts and governors

In 2008-09, NHS foundation trusts included quality reports within their annual reports for the first time.

Whilst this initiative is at an early stage, it is still important to encourage governor participation in the:

- identification and prioritisation of quality indicators and quality priorities for the NHS foundation trust in the forthcoming year (as part of governor involvement in the formulation of the forward plan); and

- presentation of the final quality report or account after the financial year has ended (holding the board of directors to account for NHS foundation trust performance).

This may be a different approach to governor involvement in quality than previously occurred within NHS foundation trusts. As a guide, a potential timeframe highlighting where governor involvement can occur is provided below. This is likely to be flexed within NHS foundation trusts to meet their own internal reporting timeframes but provides an overview of the main tasks governors may have with regards to the quality report and accounts.

Governors may also wish to read the Foundation Trust Network publication *Making the Most of Your Quality Accounts*.

---

**Figure 12 Governor involvement in quality accounts**
What is the role of the governors?
As indicated, the annual report and accounts and auditor’s report on the accounts must be presented to the board of governors at a meeting of this group. The Financial Reporting Manual indicates this will be the annual general meeting.

This meeting should be convened within a reasonable timescale after the end of the financial year in question but must not be before the annual report and accounts have been laid before Parliament.

The Financial Reporting Manual suggests that an advertisement be placed in the local media not less than 14 days prior to the date of the meeting, stating:

- the time, date and location of the meeting; and
- that copies of the annual report and accounts (or annual report and summary financial statements) of the NHS foundation trust are available, on request, prior to the meeting and how copies can be obtained.

What does “presented to the board of governors” mean?
Each of the above documents are presented to the board of governors to provide important information in relation to the NHS foundation trust’s performance. Whilst governors have the opportunity to comment on the documents, they do not have the scope to make changes to them.

The presentation of these documents to the board of governors is important as it informs governors in relation to their other statutory duties (for example, the performance of the chair or the other non-executive directors), allows them to provide informed feedback to the board of directors and enables them to inform external stakeholders (including any that they represent) on how the NHS foundation trust is performing.

Governors can then ask additional questions on NHS foundation trust performance as appropriate. It is this performance information and subsequent response to questions, upon which the board of governors will base their own views of how the NHS foundation trust is performing. This is an essential part of how governors collectively can hold the board of directors to account.

Internal feedback
The point at which the documents referred to above are presented to the board of governors may be a good opportunity for the board of directors to brief the board of governors on the overall performance (financial and otherwise) of the NHS foundation trust in the previous year.

The board of governors should also provide feedback to the board of directors in light of the overall performance of the NHS foundation trust.

The responsibility for arranging such provision of information should rest with the chair.

External stakeholders
As well as providing feedback to the board of directors, the board of governors should explain to the constituencies and the stakeholder organisations that either elected them or appointed them, how the NHS foundation trust has performed over the previous year. This may be done around the time of the annual report and accounts.
Preparing the forward plan

As well as having a role in relation to the current performance of the NHS foundation trust, the board of governors should also be involved in strategic planning.

Issues that we will look at in this chapter include:

• what is the forward plan?;
• the governors’ role in strategic planning; and
• what the board of directors does in relation to governors’ input.
What are the legal requirements?

Under the terms of the legislation the NHS foundation trust must give Monitor forward planning information in respect of each financial year.

This must be prepared by the board of directors. Nonetheless, the legislation gives the board of governors a role in relation to this. The legislation states that:

“In preparing the document the directors must have regard to the views of the board of governors”.

This means that it is therefore for discussion and not approval.
What is the forward plan?

Monitor’s *Compliance Framework* sets out its approach to compliance by NHS foundation trusts with their terms of authorisation. As part of this, Monitor requires each NHS foundation trust to submit an annual plan including forecast financial performance, details of any major risks to compliance with their terms of authorisation and how the NHS foundation trust intends to address these. This will also include forward planning information for publication.

Further advice in the preparation of the annual plan submissions can be found in Monitor’s publication *Annual Plan: Advice for NHS Foundation Trusts*, which is updated annually. The information provided in the annual plan includes:

- commentary on the strategic overview for the NHS foundation trust, changes to previous forecasts, risk analysis and membership plans;
- a membership report;
- board statements on risk, service performance, clinical quality, compliance with the terms of authorisation and board roles, structure and capacity;
- financial projections; and
- updates in relation to Schedules 2 (mandatory goods and services) and 3 (mandatory education and training) of the NHS foundation trust’s terms of authorisation.

The NHS foundation trust will need to make clear the elements of its annual plan that do not constitute forward planning information for publication.
What is the role of the governors?

The Code of Governance states that governors can “expect to be consulted on the development of forward plans for the trust and any significant changes to the delivery of the trust’s business plan.”

The forward plan incorporates both operational and strategic information. The role of the board of governors is to ensure that the interests of members are considered when strategic developments are proposed.

This role may be performed in various ways but the key stages are outlined below.

Canvassing members’ opinions

Governors should ensure that the opinions of their members are canvassed, thus ensuring full participation in the planning process. This can be achieved using various methods, for example, holding constituency meetings or open days, the use of questionnaires on the trust website or simply by talking to staff and the public throughout the year to better understand what they would like to see the trust achieve in the future. Some NHS foundation trusts are considering offering secretarial support to their governors to facilitate such exchange of information.

Appointed governors should canvass the opinion of others within the stakeholder body they represent.

Whilst canvassing opinion should be done throughout the year, consideration should be given to the cost implication of the more expensive canvassing options and when during the year such options are best employed.

Discussing planning priorities with the board of directors

Governors must then feed back the views of their members to the board of directors. This has been achieved in a variety of ways by NHS foundation trusts to date. A non-exhaustive list of processes is provided below:

- holding strategic planning events with both boards present;
- the board of governors presenting their priorities to the board of directors for consideration; and
- the board of directors providing the governors with their planning intentions and asking the board of governors to rank the strategic initiatives in importance.

Involvement of governors in strategic development plans

After a specific development has been approved by the board of directors (and incorporated into the forward plan for the trust) the governor involvement should continue to ensure that the interests of members remain represented.

To be clear, this does not mean that governors are involved in the operational planning of each initiative developed by the trust, rather that individual options for strategic developments are considered by governors at a higher level and members’ considerations are discussed.

Have you considered?

- Asking governors to assure themselves that the forward planning process is appropriate for their trust.
- Establishing a strategic planning committee for the board of governors.
What should the board of directors do in relation to governors’ input?

Forward planning remains the responsibility of the board of directors. As such, it may be that not all of the comments of the board of governors will be incorporated into the final forward plan.

Nonetheless, in this context, the board of directors must give the board of governors’ views some weight. The amount of weight given is up to the board of directors – but the governors’ views must, at least, be considered. The board of directors should consider presenting a report to the board of governors identifying where governor opinion has been accepted and incorporated into the forward plan and feeding back on areas where opinion could not be fully incorporated.

*Annual plan: Advice for NHS Foundation Trusts* provides further advice as to how the annual plan should demonstrate the process for incorporating the views of governors.

Informing stakeholders

The board of governors should inform stakeholders of the NHS foundation trust’s forward planning and the reasoning behind it.

This should be done after submission of forward planning information to Monitor.

---

**Figure 13** Potential stages of formulating the forward plan

- **Directors consider draft strategic elements of their forward plan** - December
- **Directors consider governor views on forward plans** - March
- **Governors discuss and agree the collective governor priorities for the forward plan** - December
- **Governors formally share their planning priorities with the board of directors** - February
- **Governors canvass members opinion** - All year
- **Governors inform stakeholders of the forward plans** - June – onwards
- **Forward plan information submitted to Monitor** - May
- **Governor meeting where the board of directors’ report is discussed** - April/May
- **Directors finalise the forward plan and prepare a report identifying where governor opinion has and has not been incorporated into the final version**

---

*Your statutory duties: a reference guide for NHS foundation trust governors*
Your statutory duties: a reference guide for NHS foundation trust governors
Further information

This guide has set out some of the key statutory and other responsibilities of the board of governors. However, good practice exists in many other areas. NHS foundation trusts are encouraged to utilise the various networks and information sources to access best practice and drive continuous improvements.
Further information

Monitor
Monitor’s website contains copies of all publications mentioned in this guide:

- *Model Core Constitution*;
- *The NHS Foundation Trust Code of Governance*;
- *Audit Code for NHS Foundation Trusts*;
- *NHS Foundation Trust Financial Reporting Manual (FT FReM)*;
- *Compliance Framework*;
- *Annual Plan: Advice for NHS Foundation Trusts*; and

There is also a section for governors on Monitor’s website which provides general information, as well as details of events:

www.monitor-nhsft.gov.uk/governors

The directory of NHS foundation trusts on the website contains all the information that Monitor has a statutory obligation to provide. This includes, the terms of authorisation, a list of the members of the boards of governors and directors, the latest annual report and accounts and the annual plan.

www.monitor-nhsft.gov.uk

Foundation Trust Network
The Foundation Trust Network (FTN), part of the NHS Confederation, works to raise the profile of issues facing existing and aspirant foundation trusts and to improve the influence of FTN members.

www.nhsconfed.org/networks/foundationtrust

Foundation Trust Governors’ Association
The Foundation Trust Governors’ Association aims to help all governors understand their role and support them in their learning to deliver real results for patients. It provides governors with opportunities to meet, exchange views, debate and learn from each other.

www.ftgovernors.org.uk

Appointments Commission
The Appointments Commission is the independent organisation responsible, on behalf of the Secretary of State, for appointing chairs and non-executive directors to NHS trusts. It also provides non-executive recruitment services for NHS foundation trusts. There is specific information on their website about the role of the non-executive director.

www.appointments.org.uk
Audit Commission
The Audit Commission is an independent watchdog, driving economy, efficiency and effectiveness in local public services, to deliver better outcomes.
www.audit-commission.gov.uk

Care Quality Commission
The Care Quality Commission regulates the quality of health and adult social care services in England.
www.cqc.org.uk

HM Treasury
HM Treasury is responsible for formulating and implementing the Government’s financial and economic policy. Their publication Managing Public Money is relevant to accounting officers, providing guidance on how to handle public funds of all kinds properly.
www.hm-treasury.gov.uk

Sources of further information on your NHS foundation trust’s governance arrangements
• Your trust’s terms of authorisation
• Trust secretary (or equivalent)
• Fellow governors
• Your trust’s website

Sources of further information on your NHS foundation trust’s performance
• Financial information
  • Monitor’s financial risk ratings
• Clinical performance
  • Care Quality Commission
  • Hospital guides
  • Department of Health
• Governance information
  • Monitor’s governance risk ratings
## Glossary of terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Audit Committee</strong></td>
<td>Trust’s own committee monitoring trust’s performance, probity and accountability.</td>
</tr>
<tr>
<td><strong>Carer</strong></td>
<td>A carer is someone who gives a patient or service user regular support, but who is not paid or employed by the statutory services. They can be a neighbour, friend, family or partner.</td>
</tr>
<tr>
<td><strong>Chair</strong></td>
<td>The chair is the highest office of an organised group such as a board or committee. The person holding the office is typically elected or appointed by the members of the group. The chair presides over meetings of the assembled group and conducts its business in an orderly fashion.</td>
</tr>
<tr>
<td><strong>Code of Governance</strong></td>
<td>Document published by Monitor – <em>The NHS Foundation Trust Code of Governance</em>. This document gives best practice advice on governance, and NHS foundation trusts are required to explain, in their annual reports, any non-compliance with the code.</td>
</tr>
<tr>
<td><strong>Commissioners</strong></td>
<td>Authorised primary care trust staff in charge of commissioning contracts with service providers of healthcare services, typically from an acute trust.</td>
</tr>
<tr>
<td><strong>Committee</strong></td>
<td>A small group, intended to remain subordinate to the board it reports to.</td>
</tr>
<tr>
<td><strong>Constitution</strong></td>
<td>A set of rules which define the operating principles for each NHS foundation trust. It defines the structure, principles, powers and duties of the trust.</td>
</tr>
<tr>
<td><strong>DH or DoH</strong></td>
<td>Department of Health. The Government department that supports the government to improve the health and well being of the population.</td>
</tr>
<tr>
<td><strong>Executive directors</strong></td>
<td>Board-level senior management employees of the NHS foundation trust who are accountable for carrying out the work of the organisation.</td>
</tr>
<tr>
<td><strong>Governors</strong></td>
<td>Elected or appointed individuals who represent members or stakeholders through a board of governors.</td>
</tr>
<tr>
<td><strong>LINks</strong></td>
<td>Local Involvement Networks (formerly PPI Forums). A LINk is made up of individuals and community groups who work together to improve local health and social care services. The job of a LINk is to find out what people like and dislike about local services, and to work with the people who plan and run them to help make them better.</td>
</tr>
<tr>
<td><strong>Monitor</strong></td>
<td>The independent regulator of NHS foundation trusts.</td>
</tr>
<tr>
<td>------------</td>
<td>---------------------------------------------------</td>
</tr>
<tr>
<td><strong>NHS foundation trusts</strong></td>
<td>NHS foundation trusts provide health and/or social care services within the NHS. They are part of the Government’s drive to devolve decision making from central to local organisations and communities, so they are free from central government control – their boards are responsible for how the foundation trust operates and they are accountable to their local communities, through members and governors. They can keep surpluses to invest in improved, and new, services for patients and service users, and can borrow to support these investments.</td>
</tr>
<tr>
<td><strong>NHS trusts</strong></td>
<td>NHS trusts provide health and/or social care services within the NHS. They are legally obliged to break even financially and strategic health authorities manage their performance.</td>
</tr>
<tr>
<td><strong>Non-executive director</strong></td>
<td>Generally independent appointees, who work with the executive directors overseeing the business of the NHS foundation trust.</td>
</tr>
<tr>
<td><strong>Primary care trust or PCT</strong></td>
<td>Primary care trusts are responsible for commissioning (contracting) local healthcare services, including hospital care, mental health services and GP practices.</td>
</tr>
<tr>
<td><strong>Service user/s</strong></td>
<td>People who need health and social care for their mental health problems. They may live in their own home, stay in care, or be cared for in hospital.</td>
</tr>
<tr>
<td><strong>Strategic health authority or SHA</strong></td>
<td>Responsible for developing strategies for local health services and ensuring high-quality performance. They manage the NHS locally and are a key link between the Department of Health and the NHS.</td>
</tr>
<tr>
<td><strong>Statutory</strong></td>
<td>A requirement prescribed by legislation.</td>
</tr>
<tr>
<td><strong>HR</strong></td>
<td>Human Resources Department – a term that refers to managing “human capital”, the people of an organisation.</td>
</tr>
<tr>
<td><strong>Monitor relationship manager</strong></td>
<td>A named individual within Monitor who is the first point of contact between Monitor and any representatives of an NHS foundation trust.</td>
</tr>
<tr>
<td><strong>Vote of no confidence</strong></td>
<td>A motion put before the board which, if passed, weakens the position of the individual concerned.</td>
</tr>
</tbody>
</table>