TRUST BOARD – 27TH FEBRUARY 2008

FOUNDATION TRUST BOARD COMPOSITION

PURPOSE: To present the proposed composition of the Board of Directors of the Foundation Trust

IMPLICATIONS:

<table>
<thead>
<tr>
<th>Objectives to which issue relates</th>
<th>2: To maintain effective governance arrangements and ensure the organisation is run appropriately and in a way that inspires public confidence.</th>
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</thead>
<tbody>
<tr>
<td>Risk issues</td>
<td>Failure to ensure that the Board is structured appropriately would impact seriously on the governance of the organisation.</td>
</tr>
<tr>
<td>Financial</td>
<td>Small cost reduction</td>
</tr>
<tr>
<td>HR</td>
<td></td>
</tr>
<tr>
<td>Healthcare/ National Policy</td>
<td>In line with foundation trust requirements</td>
</tr>
<tr>
<td>Legal issues</td>
<td>Complies with all relevant legislation</td>
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</tbody>
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RECOMMENDATIONS:

That the Board approve the proposals for the composition and configuration of the Foundation Trust Board as set out in the paper

DIRECTOR: Chief Executive
PRESENTED BY: Chief Executive
AUTHOR: Chief Executive
DATE: 21 February 2008
Foundation Trust Board Composition

The current configuration of the East and North Hertfordshire NHS Trust Board consists of a Chairman plus 5 voting Executive Directors and 5 voting Non-Executive Directors. In addition, 4 other Executive Directors attend the Board as non-voting Directors (see Appendix A).

The Trust Board has little choice over who should be voting executive directors as NHS Trusts are required to allocate a vote at Trust Board to the chief officer, chief finance officer, medical or dental practitioner and registered nurse or registered midwife, in accordance with Statutory Instrument 1990 (Part II, Para. 4) – The National Health Service Trusts (Membership and Procedure) Regulations.

No legal restriction is placed upon the number of non-voting executive directors who can attend NHS Trust Boards with this matter being left to the discretion of local Boards. On occasions, NHS Trust Boards have also appointed non-voting non-executive directors in circumstances where 5 voting non-executive directors have already been appointed. The East and North Hertfordshire NHS Trust has adopted this approach on one previous occasion.

(A) Developing the Composition of the Proposed Foundation Trust Board during the Application Phase

All NHS Trusts are required to outline the Board structure that they propose to apply upon approval as a Foundation Trust in their consultation documentation. Consequently, we need to agree our proposed Foundation Trust structure by 25th February, when we commence consultation upon our Foundation Trust application.

The requirements for a Foundation Trust’s Board of Directors are described in Section (B) below. However, the composition of the current Board will also be relevant for the purpose of discussions with Monitor during the application phase, including at the Board to Board assessment.

Board to Board and other discussions with Monitor

Monitor’s latest update of the Guide for Applicants stresses the importance of the Board to Board meeting, in particular the ability of the Board to demonstrate its awareness of risks facing the Trust and how these will be managed. Proposed non-executive directors of the Foundation Trust in particular must be able to demonstrate a full understanding of all relevant issues.

As such, Monitor will require the involvement of all proposed voting directors (whether executive or non-executive) of the Foundation Trust at the Board to Board assessment and other discussions. Monitor may also wish other key operational personnel of the Trust who are involved in the Foundation Trust application and the development of the Integrated Business Plan to participate.
in discussions and the Board to Board assessment, even if such persons are not currently voting directors of the Trust and are not intended to be voting members of the Foundation Trust. Indeed, in certain circumstances, Monitor may require the involvement of such persons.

On this basis, Monitor is likely to expect the Director of HR to be involved in discussions given that a key element of the Integrated Business Plan will be details of the Trust’s leadership and workforce requirements and the development of an HR and workforce plan. Similarly, Monitor may expect the proposed company secretary of the Foundation Trust and any other key personnel fundamentally involved in the application process (e.g. the Foundation Trust Application Project Manager, however titled) to attend the Board to Board assessment and other discussions.

As there is no formal guidance as to which personnel will be required to participate in discussions with Monitor, for the Trust’s purposes this will need to be confirmed as the application develops. Monitor can be approached for confirmation on a named or no-name basis if preferred. In any event, for the reasons described below there will be no need for the Director of HR or any other non-voting member of the current Board (e.g. the Strategy Director) to be formally “appointed” in any way for the purpose of taking part in discussions with Monitor.

**Status of Non-Voting Board Members of NHS Trusts**

The law applicable to English companies has developed the concepts of “de facto” and “shadow” directors to deal with the status, in certain circumstances, of directors who have not been formally appointed to a Board of Directors. However, it is unlikely that these concepts can be applied to non-voting members of NHS Trust Boards for two reasons.

Firstly, because the legal characteristics of de facto and shadow directors are such that directors cannot easily be “appointed” as de facto/shadow directors in any formal sense. Secondly, since company law does not generally apply to NHS Trusts or their directors, it would be a complex process (and not without risk) to put in place arrangements to apply the relevant principles to directors of NHS Trusts.

Please see Bevan Brittan’s Memorandum on De Facto and Shadow Directors dated 7 February 2008 for further information in relation to this.

In certain circumstances where an NHS Trust has deferred its Foundation Trust application having already recruited non-executive directors to be nominated for approval by the Governors once the Trust is authorised, Monitor has imposed a concept of “shadow director” to allow those directors to take part in discussions such as the Board to Board assessment.

However, this shadow director concept is simply a reflection of the non-voting status of those directors in the circumstances rather than a formal “appointment” or an attempt to apply company law principles of shadow directorship to the relevant Trust. It is not necessary for non-voting members of Trust Boards to be deemed shadow directors in order to take part in discussions with Monitor.

A non-voting member of a Trust Board, even if they have a “director” title and/or are formally listed in minutes and other documents as “non-voting
Board members”, will not be able to participate in the collective decision-making of the Board and should only be listed as being “in attendance” at any Board meeting. They will not benefit from the statutory provisions allowing directors of NHS Trusts to be appointed to the initial Board of Foundation Trusts. Nevertheless, provided their role at the Trust and in the application process is sufficiently important, they may be able to participate in discussions with Monitor as part of the application process, as described above.

(B) Requirements for Foundation Trust Board Composition

Monitor’s guiding principle in the composition of Boards of Directors (as set out in his Foundation Trust Code of Governance) is that there should be a balance of executive and non-executive directors (and in particular independent non-executive directors) such that no individual or small group of individuals can dominate the Board’s decision-making.

In accordance with the Code of Governance and the principles of good corporate governance generally, it is recommended that the Foundation Trust’s constitution provide that at least half of the Board of Directors, excluding the Chairman, should be non-executive directors determined by the Board to be independent. The Code of Governance lists a number of factors to be considered in determining the independence of non-executive directors.

All directors should be able to exercise one full vote with the Chairman having a second casting vote on those occasions where a decision is tied.

In consultation with the Board of Governors, the Board of Directors should appoint one of the independent non-executive directors to be a “senior independent director” with a liaison role between the Board, governors and members.

The NHS Act 2006 sets out minimum requirements for the composition of the Board, as described below. Subject to these requirements, it is up to the Trust to determine its Board composition, provided that the proposed composition can be justified in the Trust’s governance rationale which forms part of its application.

Minimum Requirements for Board Composition

Executive Directors

One of the executive directors shall be the Chief Executive, who will be the Accounting Officer. The other executive directors shall be the Finance Director; a registered medical practitioner or a registered dentist (within the meaning of the Dentists Act 1984); and a registered nurse or a registered midwife (i.e. within the meaning of the Nurse and Midwifery Order 2001). Although Monitor may accept the holding of an executive directorship post on a job-share basis by two persons, he will not accept the sharing of any of the statutory posts described above. If the Trust proposes that one or more executive director posts be shared, this should be discussed with Monitor.

Non-Executive Directors
A person can only be a non-executive director of a Foundation Trust if they are either (i) a member of the public constituency or (ii) a member of the patients’ constituency (if there is one) or (iii) where any of the Trust’s hospitals includes a medical or dental school provided by a university, a person who exercises functions for the purposes of that university (paragraph 16(4) of Schedule 7 of the NHS Act 2006). The Board of Governors is invested with the power to appoint non-executive directors, so even where a person satisfies this criteria it will still be up to the Board of Governors to decide whether to appoint that person as a non-executive director.

The effect of these provisions is that a university which provides a medical or dental school for a Foundation Trust will only have the right to nominate a person for appointment as a non-executive director. The legislation instead provides that where a university provides a medical or dental school for a Foundation Trust, at least one member of the Board of Governors must be appointed by that university (paragraph 9(6) of Schedule 7 of the NHS Act 2006).

Size of the Board

The view of Monitor has tended to be that the size of the proposed Foundation Trust Board should reflect the size and complexity of the organisation.

There is no limit on the number of executive or non-executive directors of a Foundation Trust Board, though Monitor recommends that the Board should not be so large as to be unwieldy. Monitor is comfortable with the concept of providing for a minimum and maximum number of executive and non-executive directors in a Foundation Trust’s Constitution. This will allow the Trust to change its Board composition from time to time without amending its Constitution (which requires the approval of Monitor).

Beyond the mandated members of the Board, there is wide variation in both the number and function of executive directors and non-executive directors of the existing Foundation Trusts. The following table provides an overview of some existing Foundation Trust arrangements:

<table>
<thead>
<tr>
<th>Foundation Trust</th>
<th>Board Size</th>
<th>NED excl Chair</th>
<th>NED excl CEO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aintree</td>
<td>13</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Basildon</td>
<td>15</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Basingstoke</td>
<td>11</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Blackpool</td>
<td>11</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Cambridge Univ.</td>
<td>16</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Doncaster</td>
<td>11</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Luton</td>
<td>14</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Peterborough</td>
<td>15</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Sheffield Teaching</td>
<td>15</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>UCH</td>
<td>16</td>
<td>8</td>
<td>6</td>
</tr>
</tbody>
</table>

All Trusts above have appointed additional voting executive directors in areas such as strategic planning, HR, Corporate Development and IT, these decisions having been taken to reflect the business of the particular Trust. A number of Foundation Trust Boards have also appointed non-voting executive directors, keeping the number of voting directors to a minimum. The Act is not
prescriptive on this beyond the minimum stipulations given above. However, the “appointment” of non-voting directors of Foundation Trusts is not recommended, for the reasons described below.

**Status of Non-Voting Board Members of Foundation Trusts**

As for NHS Trusts (see above), it is unlikely that the company law concepts of “de facto” and “shadow” directors can be applied to the status of non-voting members of Foundation Trust Boards of Directors. Please see Bevan Brittan’s Memorandum on De Facto and Shadow Directors dated 7 February 2008 for further information in relation to this.

Even if, as a matter of law, these concepts could be applied so as to allow the “appointment” of de facto or shadow directors, Monitor would have concerns in relation to this. This is because, unlike NHS Trusts, Foundation Trusts may only delegate functions to executive directors or committees of directors. Given this, Monitor does not favour the “appointment” of non-voting Board members in a de facto/ shadow director role or in any other form of “non-voting” role.

Instead, it should be made clear that any such persons do not participate in the collective decision-making of the Board and are only listed as being “in attendance” at any Board meeting. This will help mitigate the risk of Board decisions being challenged on the basis that its collective decision-making powers have been influenced on a material and/or regular basis by persons who have not been formally appointed as directors of the Foundation Trust.

**(C) East and North Herts Foundation Trust Board Composition**

It is proposed that the current Board configuration should be amended to assist the most effective Board functioning (Appendix B). In particular the number of executives attending the Board, and in what capacity, requires amendment and clarification.

The following is proposed:-

1. That the Director of Strategy be a Foundation Trust Director. If the Director of Strategy is to be appointed to the Board of the Trust prior to the Foundation Trust authorisation, the Trust will need to make a formal request to the Secretary of State to amend its Establishment Order. The consultation and approval process for this can take a matter of months. Alternatively, the Director of Strategy can continue to act as an attendee at Board meetings until the Trust is authorised and participate in discussions with Monitor based on the importance of his or her existing functions and proposed role following authorisation. It will be difficult (and indeed unnecessary) for the Director of Strategy to be “appointed” as a de facto or shadow director in the period prior to Foundation Trust authorisation, as described above. As the Director of Strategy will not be a director for the purposes of being automatically appointed to the Foundation Trust Board, the committee of the chairman, chief executive and other non-executive directors will need to approve his appointment on authorisation.

2. That the role of the current Director of Nursing be amended to reflect an increased emphasis upon assisting the Foundation Trust Board upon
clinical governance matters. Although there is no requirement to have a Director of Nursing post, the NHS Act 2006 does require that one of the executive directors should be a registered nurse (see above). However, the registered nurse could fill any executive director post.

3. That the post of Director of Corporate Development be replaced by the post of Company Secretary, attending and providing support to the Foundation Trust Board.

4. That the Director of Human Resources, whilst not a Director of the Foundation Trust, attend the Board in recognition of the substantial human resource issues being faced by the Trust as it implements its agreed strategy. The Director of HR can continue to act as an attendee at Board meetings until the Trust is authorised and participate in discussions with Monitor based on the importance of his or her existing functions and proposed role following authorisation. On the basis that the Director of HR should not be appointed as a “shadow director” once the Trust is authorised as a Foundation Trust, the Director of HR will continue in this “attendee” role at Board meetings post-authorisation if the Trust so wishes.

5. That an additional non-executive director be appointed to the Foundation Trust Board. This non-executive director may be appointed from a university background, provided that the Council of Governors approves this person and that the person exercises functions for the purposes of a university which provides a medical or dental school at one of the Trust’s hospitals.

The above changes will come into effect once the Trust is authorised as a foundation trust.

A further two changes will take effect immediately. These are:

- That the post of Deputy Chief Executive is declared redundant.
- That a new post of Associate Director of Marketing is established, reporting to the Director of Strategy. This post is being created in recognition of the substantial additional business development and marketing challenge that the organisation faces.
Appendix A

East and North Herts NHS Trust Board (current)

Chairman (V)

Chief Executive (V) Non-Executive Directors X 5 (V)
Medical Director (V)
Nursing Director (V)
Finance Director (V)
Operations Director (V)
Deputy Chief Executive Projects (NV)
Corporate Development Director (NV)
Human Resources Director (NV)
Strategy Director (NV)

V = Voting
NV = Non-Voting (attendee only)
East and North Herts NHS Trust Board (proposed)

Chairman

Chief Executive
Medical Director
Clinical Governance & Nursing Director
Finance Director
Operations Director
Strategy Director

Non-Executive Directors X 6

In Attendance: Human Resources Director, Company Secretary