# Market Oversight

Draft guidance for providers

**January 2015**

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# 1. Introduction to Market Oversight

This guidance sets out information about the Market Oversight scheme and our approach to operating it.

The guidance is primarily intended for providers of adult social care that will be in the scheme and will enable them to understand:

- What the Market Oversight scheme requires of them.
- How their financial sustainability will be assessed and how often we will meet with them.
- How the scheme might operate through all the stages of the operating model.

For other stakeholders (such as local authorities, lenders, administrators and providers not in the scheme), we will publish a short guide to the Market Oversight scheme. This more technical guidance will enable other key partners to understand:

- How we intend to monitor 'difficult to replace' providers.
- What the scheme will and will not do.
- Where we may engage with stakeholders and seek their involvement, what they need to do.

For people who use services and the public, we will publish further information about the purpose and operation of the scheme which enables them to understand:

- How Market Oversight fits with the duties of local authorities to help ensure people's needs continue to be met should a provider in the scheme fail financially.

## What is Market Oversight for?

It is to protect people using care services and their families and carers from the anxiety and distress that may be caused by the business failure of a major care provider and to minimise any disruption to their care. We do this by monitoring the performance and finances of the most significant social care providers in England and will give local authorities an early warning where we think one of these is at risk of failure and the delivery of services is going to be affected.

The scheme will identify where failure is likely, allowing the right people (providers, shareholders, lenders and other stakeholders) to take the right action to potentially avoid failure and to support local authorities to plan in case failure does happen. Through its operation, the scheme aims not to pre-empt or precipitate provider failure and market exit, nor will the CQC or government bail out failing providers or act as a lender of last resort.

## Why and how was the scheme developed?

In 2011, the largest adult social care provider in the UK, Southern Cross, experienced severe financial difficulties, leaving thousands of people at risk of losing their care service. Local authorities in affected areas worked quickly to draw up contingency plans, but it was not necessary to put these into practice as the care sector co-operated to help avoid large scale failure. However, the time involved in such a complex business restructuring and the uncertainty of the outcome caused significant anxiety and distress to the people using Southern Cross's services, their families and carers.

This prompted the Government to explore what could be done if another large or highly specialised care business failed and, specifically, how to prevent the people using its services being adversely affected. The Government issued a discussion paper (*Market Oversight in Social Care*) in October 2011 to raise the question of whether additional measures were necessary to oversee the social care market and protect continuity of care for people needing vital services.

A consultation followed in December 2012, in which the Government asked how local authority responsibilities could be strengthened and clarified in relation to people using care services that failed. It also asked whether a targeted model of central oversight was necessary and, if so, what elements should it contain. The vast majority of responses were in favour of an oversight scheme that targeted difficult to replace providers, and was light touch, intelligent and people-focused. The types of care providers mentioned in this context were specifically large organisations, providers with a strong regional or local presence or those delivering specialist services.

The Government decided CQC was the organisation best placed to deal with this work because we already have responsibilities to oversee quality and safety of care across all of England's adult social care provision. There is a clear relationship between quality and finances in care services; for example, where quality drops, this can indicate under-investment due to wider financial problems.

The scheme applies only to England, which is the area of our regulatory remit. It will come into effect on 6 April 2015.

## How we have developed our approach

We designed the Market Oversight model in co-production with a wide range of stakeholders including people who use services, service providers, commissioners, financial experts and sector representative organisations. We met with these stakeholders regularly and also held a number of events to gain people's views on specific aspects of how the model will work, such as the issues that could lead to provider failure and the types of financial, operational and quality information we will need to review.

## Evaluation of Market Oversight

We are committed to ensuring the way we regulate care services is robust and effective and that, like care providers themselves, we continually improve.

Market Oversight is not just a new function for us; financial oversight of the private, 'for profit' providers of adult social care has never previously been carried out by a public body, though the Charities Commission has regulated the finances of 'not for profit' providers owned by charities. To make sure the system is fit for purpose and delivers value for money, we will undertake a formal appraisal of Market Oversight through our Evaluation programme.

In addition to continual assessment of our methods and on-going engagement with stakeholders such as providers, local authorities and people using services, we will conduct a formal survey once the scheme is underway to understand what has gone well and what needs to be improved.

## How does Market Oversight link with local authority duties?

If providers become unable to continue to deliver care to people because of business failure, local authorities have a legal duty to 'step in' and make arrangements for anyone affected so that their needs carry on being met. Any uncertainty over whether a care provider is going to be able to carry on looking after people in the way that they need is extremely distressing for those people as well as for their families and loved ones. Some of the people who use the care service will be frail and this distress can have serious implications for their health and well-being.

Local authorities routinely manage smaller scale service closures successfully. However, they might struggle were one of these difficult to replace providers to fail financially. This might be because there is no alternative provision in the area that can cope with the sheer number of people affected, or because the provider might have been providing services to people across a number of different authority areas. Coordinating an effective response in such circumstances would need careful planning to ensure the welfare of the people that the authorities are trying to help is not put at risk.

## Market Oversight statutory framework

This section briefly sets out the statutory framework that underpins the scheme and that explains our duties, functions and powers to help operate it. This includes a summary of the regulations that support the scheme and its operation. More detail about the regulations and how and when we will use them are in the description of the operating model on page 13. The full text of the regulations is at appendix B.

Sections 53 to 57 of The Care Act 2014 (the Act) establish CQC's Market Oversight duties and functions. These are:

- Determining whether criteria apply to a provider and informing them where they do.
- Assessing a provider's financial sustainability.
- Informing local authorities where business failure is likely to mean a provider will become unable to continue delivering a service.
- Acting proportionately and minimising burdens we impose on others.

A number of different regulations set out in more detail the practical aspects of these obligations and functions:

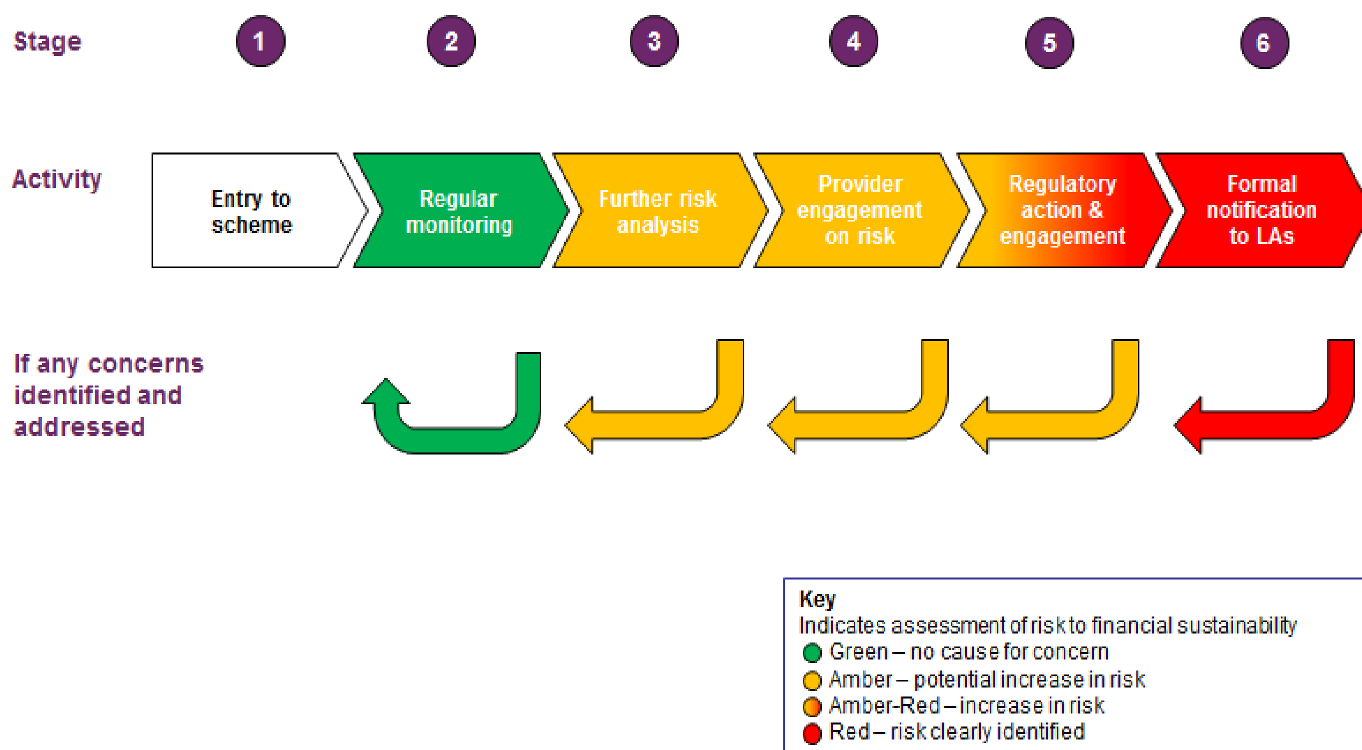
> *The Care and Support (Market Oversight Criteria) Regulations 2014* set out the criteria for entry to the scheme. The criteria are designed to be met by those care providers that, because of their size, spread or concentration, local authorities would find difficult to replace were they to fail. The criteria relate only to how difficult a provider would be to replace and bear no relation to any judgement of actual or potential risk of failure of a specific provider.
>
> Where a provider is subject to the Market Oversight scheme, *The Care and Support (Market Oversight Information) Regulations 2014* set out certain arrangements to enable us to obtain information from other legal entities which have common ownership with the registered provider and are relevant to assessing the financial sustainability of a registered provider.
>
> *The Care and Support (Business Failure) Regulations 2014* define the meaning of "business failure", in relation to the temporary duties on local authorities in England, under the Care Act to meet care and support needs of adults or support needs of carers, in circumstances where care providers are unable to carry on because of "business failure".

## Market Oversight Operating Model Overview

This section sets out a high-level overview of the operating model and the team who will put it into practice. This is followed on page 12 by a stage-by-stage detailed walk through of the model.

We adopt a 6-stage approach to assessment of financial sustainability, as set out in Figure 1 below. Providers progress through the stages on the basis of our assessment of their financial sustainability. This allows us to come to a decision about the likelihood of business failure and of this leading to services closing or being taken over by other providers.

**Figure 1: Market Oversight high level operating model**




This diagram illustrates how our activities and engagement with providers will change if concerns about financial sustainability increase. This is a useful illustration but the assessment process is not a 'one size fits all' approach. Each provider and each individual scenario require different approaches at each stage. The length of time providers spend at each stage will also vary. It is best to think of this as an 'evolving conversation', which grows more complex and focused as the process moves up the stages. We also recognise that providers may pass through stages quickly and that some stages may be missed out in a fast moving situation.

We will not publish the stage in the operating model that providers are at currently, or the stages they may have been at previously. The Market Oversight scheme is not acting as a credit rating agency; our legal duty is to inform local authorities only when a potential business failure is likely to cause a regulated activity to cease or change. Providing an external commentary on potential risk could precipitate failure which would put people who use services in a vulnerable position. This is the very situation which the scheme is intended to avoid. Each specific provider will have individual and particular risks and merely confirming the stage in the model is crude and open to misinterpretation if all facts are not known. For example, it may be that a provider is at stage 4 because their business affairs are complex and we need to engage with them in more focused ways than other providers. This does not necessarily mean they are more likely to fail than a provider at stage 2.

**Stage 1** is entry to the scheme. The provider has satisfied at least one of the entry criteria or has been included in the scheme following a decision made by Secretary

of State for Health to do so using powers in the Care Act. Further details are at page 12.

**Stages 2 and 3** involve us seeking regular financial and quality information from providers and routine engagement (stage 2) and to investigate further, where this indicates areas of concern (stage 3). A provider at stage 3 will be subject to more risk analysis on the information already provided and we may ask for more information to help confirm our assessment.

Further details are at page 16.

**Stage 4** involves us seeking additional information to understand and assess any financial sustainability concerns identified at earlier stages.

A provider at stage 4 will be asked to attend a Risk Assessment Meeting with us so that we can get a better understanding of the issues we have found and the reasons for them. Providers may be required to give us additional financial information over and above that required at earlier stages to help inform further, more detailed, risk analysis and to support any representations made at the meeting. Further details are at page 20.

**Stage 5** represents a more significant escalation of risk, where we have increased concerns about the provider's financial sustainability. We will look to use a broader range of tools than at earlier stages to seek more information about a provider's plans to address any concerns identified and to monitor any restructuring discussions with stakeholders. This may include requesting a Risk Mitigation Plan from the provider or appointing advisers to perform a focused Independent Business Review. Provider engagement will be driven by necessity and will be more frequent at this stage compared to previous stages. Further details are at page 21.

**Stage 6** indicates the highest level of risk. If a provider reaches this stage it means that we consider it is likely to become unable to continue delivering a service because of business failure. We will notify local authorities in which the provider is delivering services so they can prepare contingency plans to protect people's continuity of care, if the need arises. It is important to note that even where business failure has been identified as likely to happen, it may not actually occur. Further details are at page 24.

Throughout the model, providers can move backwards and forwards across the stages to reflect decreasing as well as increasing risks. The model works both ways.

## How we will handle commercially sensitive information

Information submitted by providers for the purposes of Market Oversight will be stored under strict access control and only available to staff on a 'need to know' basis.

When we receive requests for information under the Freedom of Information Act (FOIA), in Parliamentary Questions or in letters to ministers we will consider whether we are able to release the information by referring to the FOIA exemptions[1]. We will always consult with a provider where we receive such requests.

Any decision to refuse to release information under FOIA may be challenged by the requester making a complaint to the Information Commissioner's Office (ICO), and subsequently to the Information Tribunal and courts. This means that any refusal to disclose by us could potentially be overturned.

In line with our retention policy, we will hold the information we have gathered from providers and stakeholders in support of our Market Oversight duties for seven years following the exit of a provider from the scheme. After seven years, we will securely destroy this information and inform the provider that this has taken place. However, we will retain the record of our judgements and actions as part of the assessment of the provider.

## The team

Prior to the introduction of Market Oversight, our Corporate Provider Team regularly engaged with the largest providers in the country on matters of quality. The team collates information from inspections and other information we hold about services. These reports on the quality of the overall organisation formed the basis of our discussions with the provider about:

- Any areas of best practice.
- Any concerns we might have identified and what the provider is doing to address these.
- Feedback to us about our methodology.

In implementing the requirement on us to assess the financial sustainability of providers, we are building on this existing knowledge, expertise and relationships, both internally and externally.

The Market Oversight scheme will be operated by a new in-house team. This will be made up of a number of experts with significant experience of financial issues,

[1] Section 43 (commercial interests), Section 41 (information provided in confidence) and Section 31(1) (g) (where a disclosure would be likely to prejudice the exercise of a public authority's functions).

including insolvency and financial risk, experts in understanding quality issues in corporate providers, and experts in Intelligent Monitoring and analysing information.

All providers in the Market Oversight scheme will be allocated a named strategic, financial and operational lead:

- The strategic lead will be a senior person from CQC; usually a Deputy Chief Inspector or Head of Inspection and they will be responsible for engaging with providers at a strategic level.
- The financial lead will be an experienced finance professional from the Market Oversight Team. They will be responsible for maintaining oversight of the provider's *financial* profile and working with analysts and the Corporate Provider Team.
- The operational lead will be from CQC's Corporate Provider Team and they will be responsible for maintaining oversight of the provider's *quality* profile, maintaining on-going relationships with the provider and working closely with the wider Market Oversight team.

Providers of significant scale that do not meet the entry criteria for Market Oversight will also be assigned an operational and strategic lead for our on-going engagement with them on issues of quality performance.

# 2. How we deliver the Market Oversight scheme

This section sets out a stage by stage guide to how the model will work in detail. It will explain:

- what each stage is for
- what is expected from providers and other stakeholders
- what we will do, when and how
- what happens next.

## Stage 1 – Entry to the scheme

**What is this stage for?**

This stage is to identify and notify providers that will enter the scheme. There is no suggestion at this stage that providers are at any risk of financial failure, only that they meet the thresholds set out in law which suggest they would be difficult to replace.

**What will we do?**

There are two routes for a provider to enter the scheme.

(i) **By satisfying the criteria set out in regulations:**
The provider must be sufficiently large at a national level or have a significant local or regional presence in a number of local authority areas. Their size means that their failure to keep on providing services would challenge the continuity of care in those areas.

(ii) **Being brought into the scheme by the Secretary of State for Health:**
This may happen following a recommendation from a panel of individuals selected because of their expertise in specialist services who judge that the services the provider supplies are so specialist that, should the provider fail, local authorities would find it difficult to find temporary alternative provision for people using those services. For more information on this panel, see page 14.

The Care Act allows for anyone to make a recommendation to the Secretary of State that a provider be brought into the scheme. This is because the governing legislation is not able to describe every possible situation where a provider may be difficult to replace should it fail. We will consider recommending to the Secretary of State that a provider should be included, even though it does not meet the entry criteria laid down in legislation, where we believe its failure would have a significant impact on people because local

authorities would struggle to find a replacement for the service. Whether a provider is brought in this manner into the scheme will rest with the Secretary of State.

Appendix C sets out the Secretary of State's powers to 'passport' providers in to the regime, examples of where these powers may be used and the process that will be followed.

We will assess providers against the criteria set out in regulations (see appendix B) to determine whether they should enter the scheme or not.[2]

Regulations define the conditions a provider must satisfy in order to be included in the scheme, as follows:

For a residential care provider, they must have a bed capacity:

(a) of at least 2,000 anywhere in England (i.e. significant size of provider); or

(b) between a total of 1,000 and less than 2,000 with at least 1 bed in 16 or more local authority areas (i.e. significant scale regionally or nationally); or

(c) between a total of 1,000 and less than 2,000 and where capacity in at least 3 local authority areas is more than 10 per cent of the total capacity in each of these areas (i.e. significant concentration in a local or geographic area).

For a non-residential care provider, they must:

(a) provide at least 30,000 hours of care in a week anywhere in England; or

(b) provide at least 2,000 people with care in a week anywhere in England; or

(c) provide at least 800 people with care in a week anywhere in England **and** the number of hours of care divided by the number of people cared for must be more than 30. For example, if 900 people receive care in a week then more than 27,000 hours of care must be provided in that week for the criteria to be satisfied.

We will publish the names of the corporate groups and registered providers that are subject to Market Oversight as well as the locations from which those providers deliver regulated adult social care.

Providers that enter the scheme must remain in it for a minimum of 12 months unless removed through a decision from the Secretary of State for Health.

Providers remain in the scheme for this time in order to avoid those that are close to the boundaries of the entry criteria continually coming in and out of the scheme. This period also gives us the opportunity to come to a reasoned assessment of the

[2] We will do this monthly for residential care providers and annually for providers of non-residential care. The difference is due to the information we hold about providers; we know how many beds residential care providers have through registration but do not collect care hours or numbers of clients from providers of non-residential care. In speaking with providers, we found the annual collection of this data was thought to be the most proportionate and appropriate approach. Non-residential care provision is thought to remain relatively stable unless the organisation acquires or sells parts of its business.

provider. It is not in the interests of people using the service for a provider which dips slightly below the entry threshold to exit the scheme before we have assessed its financial sustainability.

We will take a proportionate approach to assessment. For instance, if a provider significantly reduces in scale, by selling part of its business, and would not necessarily still be difficult to replace, the depth and frequency of our monitoring activity will reflect this.

Where providers meet the criteria, we will notify them of their entry to the scheme by letter. We will give providers the opportunity to request a review of the decision to include them in the scheme (see below).

## Specialist panel

A number of providers delivering specialist services are likely to be subject to the Market Oversight scheme as they will form part of a larger organisation that satisfies the entry criteria for that regime. However, there may be a very small number of providers delivering specialist services that do not meet the entry criteria, but whose failure would be challenging for the affected local authorities to find a replacement provider if they do not receive an early warning of likely failure.

As it is not possible to easily define such specialist services, specific entry criteria for the Market Oversight scheme have not been devised.

Instead, the Department of Health will set up a panel of experts with significant knowledge of the specialist care sector who will make a recommendation to the Secretary of State for Health about any specialist provider they feel should be included in the scheme. The Secretary of State will consider the recommendation and any other evidence in deciding whether to use powers in the Care Act to bring that provider into the scheme.

Any providers brought into the scheme via a recommendation to the Secretary of State will need to be specifically named in the regulations. Appendix C contains further details, including:

- How providers can request that the panel review their decision to recommend to the Secretary of State that they are brought into the scheme.
- How they will be notified that they are subject to it.
- The process by which they will leave.

## Review of decision to be entered in the scheme

Providers may ask for the decision to include them in the scheme to be reviewed. They have 28 days from the date of the letter notifying them of their inclusion in the scheme to seek a review. For providers we consider meet the entry criteria, the grounds for reviewing decisions will be on the basis of factual accuracy (for example, inaccurate number of care home beds in CQC records) or a misunderstanding on our part of the provider's organisational structure.

While we are considering this request, providers will still be subject to assessment under the Market Oversight scheme and so must continue to comply with requests for information in a reasonable time frame. Decisions will be made within 28 days of the request being made and we will notify the provider of the outcome. This decision will be final.

Appendix C sets out how providers can raise objections following a recommendation being made to the Secretary of State for Health that they be brought into the scheme.

## Leaving the scheme

After a year has passed, if residential or non-residential care providers no longer meet the entry criteria, they will be formally notified that they have exited the Market Oversight scheme.

## Stages 2 and 3 – Regular monitoring and further analysis

### What are these stages for?

To carry out routine monitoring of providers' finances and quality (stage 2) and to investigate further, where this indicates areas of concern (stage 3).

### What we expect from providers

We expect providers to give us the information we require in the necessary format and to appropriate timescales to enable us to monitor their risks. The information we will be asking for includes:

- **Business context information:** this will be collected in an initial Business Context Meeting. It will consist of information on organisational structure, financing structures, property ownership, shareholders and any other information that the provider thinks will be important for us to understand their business. This will be updated each quarter only if required. Business strategy information will be collected at the initial business context meeting and at the annual financial review meeting thereafter.
- **Financial information:** on entry to the scheme only, providers will be required to provide information on the financial performance for the previous 12 months. On entry and annually afterwards, providers will need to submit the annual budget for the current year, split into quarters. This is required to improve our understanding of their business and to act as a benchmark for future financial analysis. Following entry to the scheme, providers will be required to submit information covering performance over the previous quarter on an on-going basis. Providers will have six weeks, following the end of their financial quarter, in which to return this information to us. The information will be gathered using a standard Financial Oversight Submission Template which you can view on our website.

## The Financial Oversight Submission Template

The Financial Oversight Submission Template will largely be based on unaudited management information to:

- Enable the calculation of standard risk indicators directly from information the provider submits.
- Identify the reasons for underperformance without the need for substantial additional information requests.
- Assist with the correlation of quality data and financial performance.

Providers will, as a result, have to provide a reconciliation between the Statutory Accounts and the information submitted on an annual basis so we can check the accuracy of the financial submissions.

The Financial Oversight Submission Template is largely based on consolidated group financial information (as per the "group undertaking" definition of Section 116(5) of the Companies Act 2006) as it will be at this level where most business failure risks will be assessed. However, there are two areas where more detailed financial information will be required:

- **Profit and loss by regulated activity:** Where relevant, the profitability of the group is split between residential care, non-residential care and other regulated activities such as nursing care and non-regulated activities. This will enable us to identify the areas of the business that may already be subject to financial oversight from other regulators in order to avoid duplication of effort and to ensure there is a coordinated response if any concerns are identified. The performance of residential and non-residential services is also presented separately to help compare financial and quality indicators.
- **Profitability (EBITDA) by registered provider:** Our regulatory duty needs to be performed at registered provider level; some corporate providers may have several legal entities which are registered providers. As a result, while the focus of our analysis is on group financial performance, we will also need to understand profitability at registered provider level so that any loss-making providers within the group can be identified. We are not asking for more detailed information on each registered provider at this stage to reduce the administrative burden, however, additional information may be required if issues are identified.

**What will we do?**

We will use the information contained in the Financial Oversight Submission Templates alongside information drawn from our inspections and registration data to calculate a standard set of risk indicators. The indicators will be reviewed as a whole, initially, to assess financial sustainability and identify business failure risks that need to be followed up with further analysis or a meeting with the provider. The indicators will not be used as prescriptive individual tests.

In line with our policy on our wider Intelligent Monitoring system, we will not publish the thresholds used by our indicators. The financial indicators are only a small part of the overall assessment process and are open to misinterpretation if viewed in isolation. They are too much of a 'blunt instrument' to be adopted for provider monitoring by other agencies or for other purposes, outside of the specific context of our operating model (for example, in local authority market shaping activities) and without the specific skills required. They can only ever be used as prompts for further analysis and engagement with providers and will not be used to calculate a specific credit or risk rating.

The standard risk indicators that will be used are set out in detail in appendix D and are split into the following key categories:

- **Quality indicators:** the results of inspections and information from Provider Information Returns (routine submissions which all providers of adult social care are required to submit) will be aggregated to identify operational issues that could have an impact on financial performance. The quality indicators will also be used to understand if the current financial position of the provider is having an impact on the quality of its service provision.
- **Trading indicators:** trends in relation to sales, profitability levels and cash generation will be monitored against budget and the prior year. We will use these indicators to understand the operational gearing of a provider and to identify if trading performance is improving or deteriorating. Our interpretation of the trading indicators will take into account the regulated activities performed by the provider (i.e. non-residential versus residential care) and any relevant business context information (such as the impact of new home developments). A deteriorating trading performance may lead to future financial problems and is likely to result in further analysis being performed (stage 3).
- **Debt indicators:** the level of debt in the provider, including long term operating lease commitments, will be assessed against standard bank lending criteria. We will use these indicators to understand if the provider has too much debt, and the impact this has on its ability to absorb any potential future trading risks. A high level of debt combined with a deteriorating trading performance will lead to further analysis being performed (stage 3), and potentially a Risk Assessment Meeting with the provider (stage 4).
- **Debt payment indicators:** the ability of the provider to meet its debt and lease obligations will be assessed. We will use these indicators to understand if the provider can afford to pay its debts as they fall due. Limited headroom between debt payments and cash generation will lead to a Risk Assessment Meeting with the provider (stage 4).
- **Qualitative risk questions:** these questions will be used to identify the existence of elevated business failure risk factors, which may not be identified by looking at financial information in isolation. These questions, along with the debt payment indicators above, will be the key indicators of business failure. A Risk Assessment Meeting with the provider (stage 4) will be held if the existence of elevated risk factors is confirmed.

A provider can normally expect to have, as a minimum, four key engagements with CQC over the course of a year:

- An annual financial review meeting
- Three meetings on quality performance

The frequency of these meetings may increase due to either the size of the provider, the current performance or potential risk.

As indicated above, where the standard risk indicators show potential areas of concern, we will carry out further analysis of the information we hold to better understand the impact on business failure risk (stage 3), and to decide whether a Risk Assessment Meeting with the provider is required. This will include looking in more detail at historical trading trends, reading inspection reports, performing stress testing on key indicators (such as debt and debt payment) to understand the future impact of trading trends and market risks, and reviewing publicly available information (such as press announcements).

**What happens next?**

There are two potential outcomes for providers from these steps:

i. Where no elevated risk concerns are identified from the standard risk indicators and any further risk analysis we have performed, providers remain in a cycle of regular monitoring. This will include submitting the required financial information, business context information and qualitative risk information on a quarterly and annual basis. The provider will remain in the regular cycle of four meetings a year with us so we can consider the financial and quality performance as described above.

ii. Where the standard risk indicators and further risk analysis we have performed identify elevated business failure risks, or prove inconclusive because we do not understand a particular aspect of a provider's business, a Risk Assessment Meeting will be held with the provider. Regular monitoring will continue alongside the increased engagement with the provider.

## Stage 4 – Engaging with the provider on risk

**What is this stage for?**

To meet with the provider to discuss any concerns identified in stages 2 and 3.

**What will we do?**

Where the review of evidence at stage 3 either proves inconclusive or identifies potential financial sustainability risks which means we are not able to gain assurance as to the sustainability of the provider, we will arrange a Risk Assessment Meeting with them. This will give the provider an opportunity to explain any concerns we have identified in our analysis of the financial submissions and quality data. This may be a relatively simple meeting to explain a change in financial performance or capital structure or to explain what is being done to address issues affecting the quality of services. We will seek to understand whether issues are localised or affecting the whole organisation and also what steps the provider is taking to tackle these issues.

**What happens next?**

There are three potential outcomes for providers from this stage:

(i) The provider will return to regular monitoring (stage 2) if explanations and supporting information are provided at the Risk Assessment Meeting which address our concerns.

(ii) The provider will remain at this stage if financial sustainability risks are confirmed but appear to be under management control. This may require closer monitoring of financial performance and may involve more frequent information requests and additional meetings with management.

(iii) The provider will move on to stage 5 if financial sustainability risks are confirmed and there is potential for them to escalate. For example, the provider is in debt restructuring negotiations with its lenders.

## Stage 5 – Regulatory action and engagement

**What is this stage for?**

For us to use our regulatory tools to gain more detailed information on financial sustainability risks and to access professional advice where appropriate.

For us to understand what the next steps are for the provider, to understand the intentions of its stakeholders (for instance, lenders and shareholders), and to monitor any debt restructuring negotiations.

**What will we do?**

Where the provider is reliant on the support of stakeholders such as lenders or shareholders to remain viable, we will seek assurance that the provider has their continued support. This might be through written evidence or it might be through meeting with these stakeholders. We will never engage with any stakeholders without the provider's consent.

Where the provider's plans involve any form of business or debt re-structuring, we will shadow the negotiations it has with lenders and/or landlords at this stage – again, with the consent of the provider.

What this effectively means is that we will be party to ongoing negotiations and restructuring proposals so that we are able to assess how these will affect providers' abilities to carry on regulated activities. For instance, if it is proposed that specific care services will be sold or closed, we will be aware and are compelled to share this with the local authorities where these services are delivered.

While the provider and other parties involved in these negotiations will undoubtedly have the interests of people using the services at the forefront of their considerations, it is important to note that our sole purpose for being involved in these discussions is to assess the likely impact on those people and to make sure local authorities have the time and necessary information to respond. It is not for us to argue for, or against, any particular commercial outcome, nor is it for us to become involved in commercial discussions, except to the extent they impact on continuity of care.

To assist in our assessment of the notification criteria, we may decide to use of one our regulatory powers and commission an Independent Business Review or request that the provider produces a Risk Mitigation Plan. These tools are explained in more detail below.

## Independent business reviews

Where our assessment of financial sustainability requires it, we will consider using our regulatory powers to commission, or require the provider to commission, an Independent Business Review (IBR) or Risk Mitigation Plan. We would do this when we have concerns that the business strategy or financial position poses a risk to sustainability or we require clarification of issues discussed at the Risk Assessment Meeting.

Through an IBR we would have the assistance of independent advisors who would provide expert insight on certain aspects of a provider's group structure, financial performance and/or future plans. This is likely to be narrower and more focused than an IBR that may be undertaken by lenders, although we may use a broader focused review if necessary. This will enable us to access specialist advice and support on complex areas of risk and during the final stages of restructuring negotiations. Other than CQC's administrative costs, providers are liable for the cost of carrying out an IBR.

Examples of where we may need an IBR are:

- The provider has a complex legal or financing structure that requires specialist assessment.
- We do not have adequate visibility on current trading, which may have an influence on the provider's risk profile.
- The provider's future financial position is dependent on delivering a restructuring and/or turnaround plan. An independent view is required on the risks of achieving the plan and the likely outcomes if the plan is not achieved.
- We need to review the findings of an IBR already requested by a lender.

## Risk Mitigation Plan

We may require a Risk Mitigation Plan to be drawn up by the provider to explain how they will mitigate or eliminate any risks should current agreements with financial stakeholders fail to hold or any required improvements in performance are not achieved. It would allow us to assess the impact of any proposed restructuring plan on the continuity and quality of regulated services. We will want to reach a view on the likely effectiveness of the mitigation plan and to assess whether our duty to notify local authorities will be triggered.

For example, a Risk Mitigation Plan would be requested where:

- The IBR has identified concerns over the sustainability of the business because debt levels are too high.

- Lenders have stated they are looking at all their options, including contingency planning.
- The provider is in a restructuring process where a number of options are being pursued. There are conflicting objectives or a lack of consensus among the key stakeholders required to deliver a consensual restructuring
- The proposed restructuring plan could involve formal insolvency procedures, of which the impact on the continuity and quality of care services will need to be assessed.

The Risk Mitigation Plan will also ensure we have the information required if our duty to notify local authorities is triggered in the future. For example, we will ask the provider to give us the postcodes of all the people they care for in their own homes. This information helps us identify which local authorities are affected so that we know which ones we need to notify.

**What happens next?**

On the basis of all the information we have gathered at these stages, we will determine whether the conditions which trigger our statutory duty to inform local authorities of likely business failure have been met. These are described in detail below.

Where we do not believe these conditions have been met, we will decide the level of on-going monitoring required in order for us to be able to effectively assess whether our duty to notify the local authority will be triggered. The provider will move to the stage in the model that aligns with this assessment.

## Stage 6 – Formal notification of likely business failure to local authorities

### What is this stage for?

To provide early warning to local authorities that the business of a provider in the Market Oversight scheme is likely to fail and that this failure will potentially cause a registered provider to be unable to carry on one or more of its registered regulated activities.

### What will we do?

In describing what we will do at this stage, we set out below **when** we will notify, **how** we will notify, **who** we will notify and **what** the notification will contain. We will also look at when the duty of local authorities to step in is triggered.

### When will we notify local authorities?

Section 56(1) of The Care Act 2014 requires that, where we are satisfied that a registered provider that is subject to the Market Oversight scheme is likely to become unable to carry on a registered regulated activity because of business failure, we must inform the local authorities that we think will be required to carry out the temporary duty to ensure continuity of care. The local authorities required to carry out this temporary duty are those in which the care is delivered.

There are three conditions which have to be satisfied in order to trigger this duty to notify local authorities:

a) Business failure.

b) A registered provider is unable to carry on a regulated activity.

c) It is likely that both of these may happen **and** b happens *because* of a.

We will describe each of these in turn here.

#### a) Satisfying the “business failure” condition

Appendix B lists the activities that meet the definition of business failure as stated in The Care and Support (Business Failure) Regulations 2014.

We will consider this condition as having been met if any of these happen (or are likely to happen) to any legal entity within the wider corporate group, as per the definition of a group undertaking in section 1161(5) of the Companies Act 2006, and not just to the “registered provider” whose financial sustainability we are required to assess under section 55 of The Care Act.

We have come to this view for the following two reasons:

1. To consider that our duty to notify local authorities of likely business failure is not triggered when that failure happens to the corporate group rather than to its subsidiary registered provider(s) would completely undermine the intentions of the Market Oversight scheme.
2. In complex group structures, the subsidiary companies may not initially be placed directly into Administration. In order to gain control and rescue a business, an Insolvency Practitioner (IP) will determine the entity in a corporate group which is to be put into Administration based on what will deliver the outcome required in the most efficient and effective way. However, by placing a parent company or other holding company into Administration, the corporate provider will have effectively failed in the eyes of the public. Also, there is an increased risk, which will be deemed more than probable for the purposes of Market Oversight, that the subsidiary companies (in this case the registered providers) may be subject to an insolvency process in the future..

### b) Satisfying the "unable to carry on a regulated activity" condition

A provider becoming unable to carry on a regulated activity is represented by any event which means there is a change in the way the registered provider delivers its regulated activity or there is a change in the registered provider. The following are examples where we would consider this condition to be met, remembering of course that this inability to carry on the regulated activity must always be *because* of business failure:

- The closure of a location where the regulated activity is provided.
- A location ceases to provide one of its regulated activities (for example, a care home ceases to provide nursing care to focus on personal care).
- The lease of a care home is surrendered and is then re-leased to another provider.
- The business and assets of a care home are sold to another provider.
- A contract to provide homecare services or community services is handed over to another provider.

We will not consider the condition satisfied where there is merely a change in ownership of the registered provider (i.e. its shares are sold to another party). This is because, where a sale of shares occurs, there is no change in registered provider and no impact in the way the regulated activity is delivered; a change of control via the sale of shares of the registered provider does not currently lead to any changes in the provider's registration with CQC.

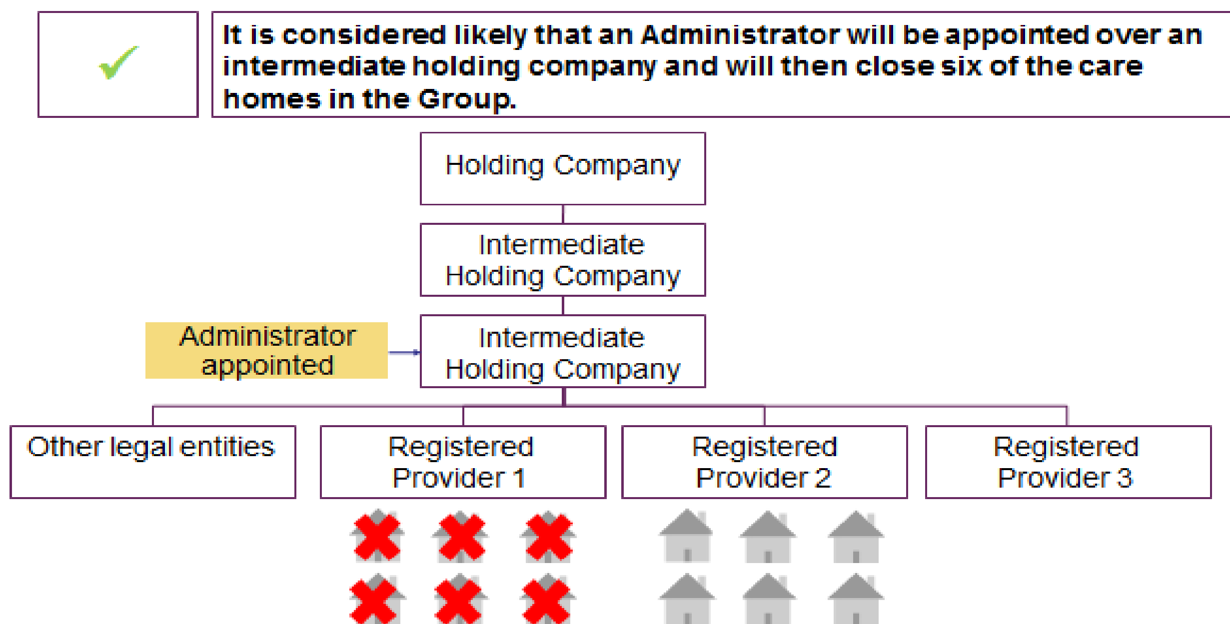
### c) Satisfying the “likely” condition

“Likely” means that, on a balance of probabilities, a registered care provider satisfies the “business failure” and “unable to carry on a regulated activity” conditions (see above).

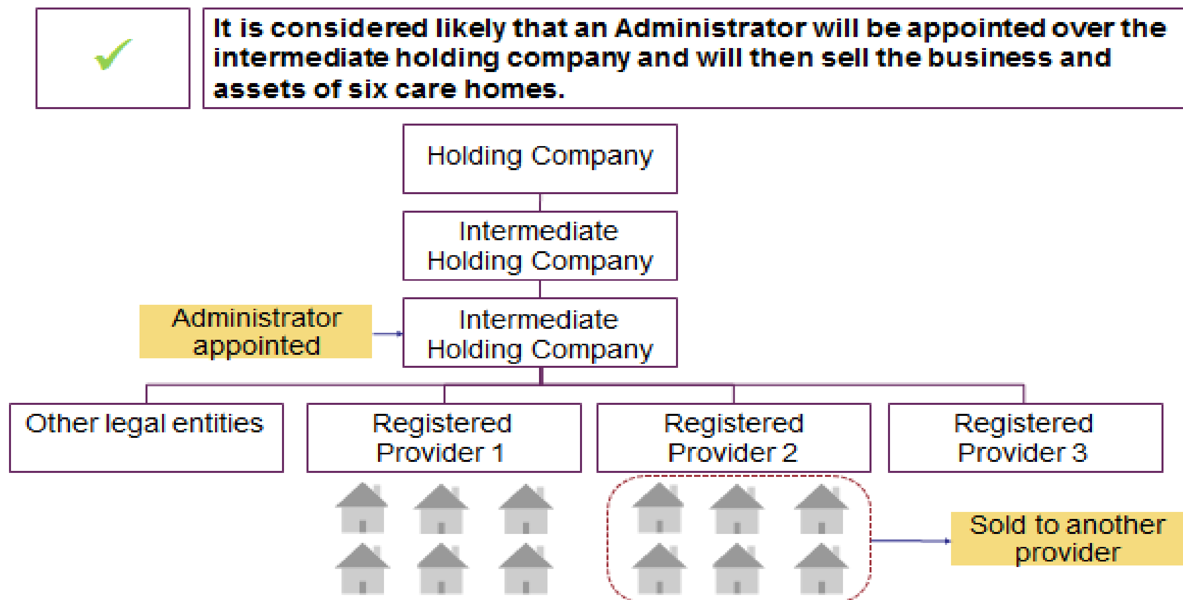
We do not have to prove conclusively that the conditions will be satisfied, only that the conditions are more probable to occur than not.
The decision will be based on a reasonable, fair and proportionate assessment of the information available from our assessment activity. There is, however, a possibility that actual business failure may never occur or the provider may not become unable to carry on a regulated activity even after local authorities have been notified by us that these are likely.

The following examples illustrate how these tests are applied in practice.

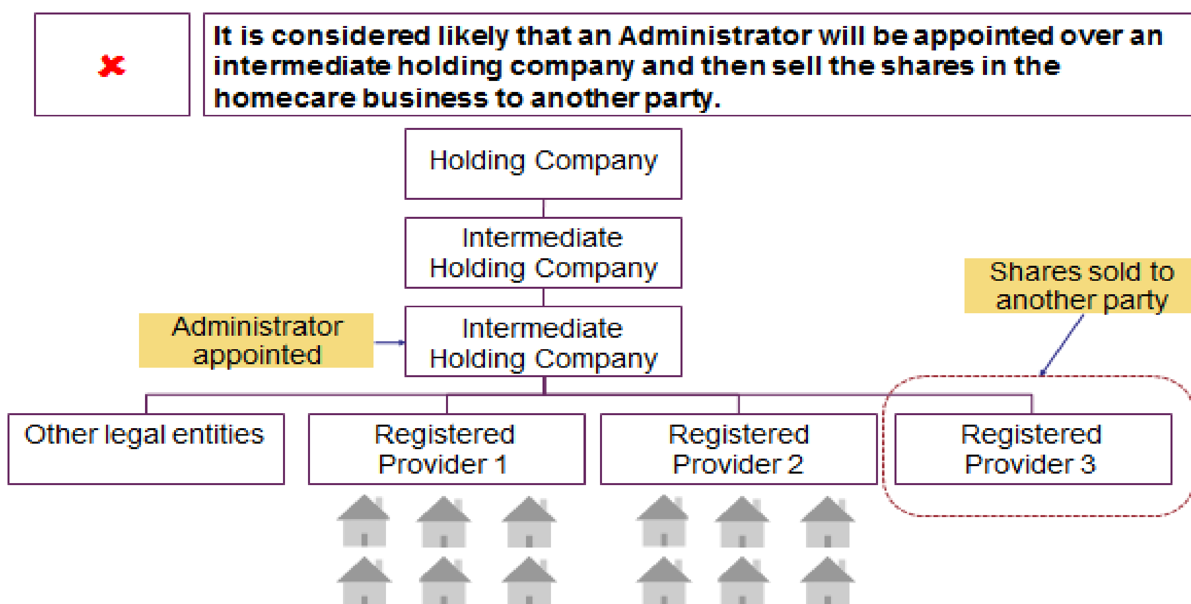
**Example 1: all three conditions are met because the holding company has entered a business failure state and, as a result, there will be care home closures.**



**Example 2: all three conditions are met are met because the holding company will enter a business failure state and, as a result, sell some of its care homes.**




**Example 3: regulated activity condition not met because the provider will still continue to deliver the regulated activity. The only difference is in the shareholders.**




## Who will we notify?

We will send the notifications to the Director of Adult Social Services, copying to the Chief Executive, at the local authorities which we believe may need to 'step in' to

ensure continuity of care. These are the local authorities where people are receiving the care service i.e. where care homes are located or where people live if they are receiving home care.

## How will we notify?

Notification to local authorities will be made by email, followed by a letter.

We will follow up the email with a telephone call to confirm receipt. We will offer the opportunity to meet or to discuss over the telephone what the implications of the notification are and what the next steps will be. These discussions will be imperative, particularly where the impact of the failure is of significant scale, is complex or is not clear. We will ask the Director of Adult Services to nominate an individual responsible for day-to-day liaison with CQC about the likely failure.

Where the failure is of significant scale, we will consider setting up a briefing meeting for local authorities to attend. Representatives from the provider will also be able to attend this meeting to explain the situation in more detail. There will be a lot of information to share and lots of questions which would suit a face-to-face forum.

## What will the notification include?

The notification will provide as full a picture as possible as to what we believe will be the impact and timescales of the likely business failure upon the registered provider's ability to carry on the regulated activity. The notification will clearly state that the provider may not ultimately fail and that there may be no impact on its ability to deliver regulated activities. However, it will state that we believe that it is more likely than not that the provider will fail and that this may be followed by an inability to deliver a regulated activity.

In the notification, we will explain why we believe that the local authority's temporary duty to ensure care continuity may be triggered. It will explain CQC's statutory duties under Section 56(1) and 56(2) of the Care Act as well as (in brief) the requirements of local authorities under Section 48(2).

The provider will have the opportunity to review the content of the notification before it is shared to ensure it is based on all available facts. However, this approval must not delay the notification being made unless there is new evidence presented which might alter our judgement that the provider is likely to fail and cease to be able to deliver a regulated activity.

Notifications will contain an honest assessment of the current situation and likely outcome and will remind local authorities that failure is not inevitable and that the purpose of notification is to allow them time to prepare contingency plans. We will

clearly set out the risks of the local authority's actions pre-empting business failure and will promote close co-operation between them and the provider and its advisors. The notification will also remind local authorities that the act of notification itself is highly sensitive, that it contains sensitive information and that it should not be shared more widely by them. Our notification to local authorities will always include:

- A clear statement that this is an early warning, giving the opportunity to plan, and that the next steps are for the local authority to engage with the provider/Insolvency Practitioner (IP).
- What the known intentions of any IPs are, for example, which specific care homes are at risk of closure or are likely to be offered for sale.
- A paragraph summarising how we came to our decision that all three conditions (as set out above) have been met.
- Which business failure activity (appointment of an administrator or receiver, for instance) is expected to happen and when this is likely to occur.
- Which registered providers and what regulated activities are affected and in which local authority areas they deliver care; local authorities will then be aware of which other authorities have received the notification.
- Details on how to contact specific individuals at the provider and within CQC for further information or advice.

## Who else will we share the fact of notification with?

There may be occasions where sharing the fact that we have notified affected local authorities will help deliver the aims of the scheme to protect people in potentially vulnerable circumstances. Sharing the notification more widely will allow other key partners who will need to support any contingency planning to be engaged appropriately, such as NHS England and Clinical Commissioning Groups for arranging nursing care. Only informing affected local authorities may also mean that people who use services and their carers and families may get different accounts of the facts.

While we are clear there are advantages in sharing the notification, there are also important aspects that would need to be handled properly to avoid any action being taken that will pre-empt or precipitate failure. The notification is of *likely* failure and not *actual* failure. There is a very real risk that, if not handled and communicated properly, wider sharing of a notification could pre-empt a failure that may not otherwise have happened or increase the impact of a failure. It is important that the process of notification is shared in a consistent manner and from a single source. When we make a notification of likely business failure, we will inform the Department of Health and any other regulator which regulates the specific provider. Beyond that, in deciding when and with whom we share the fact of notification, we will act in a fair, reasonable and proportionate way with each case being judged on its merits and in

particular we will consider the impact of failure and whether wider notification may adversely impact on the success of any restructuring plan.

## What if business failure does not occur?

Where we have previously made a notification but the provider did not go on to fail, or become unable to provide a regulated activity, we will ensure all those we informed of the notification are made aware of this fact. We will seek the provider's approval for how we describe this situation. As with the notification, this will need to be very carefully worded; we need to balance the need to be transparent with the need to be clear that the previous judgement has now been re-assessed. We will not make statements about ongoing financial sustainability, however. We will only make statements which focus on the prior notification, explaining the circumstances which led to us judging the risk of business failure was no longer likely.

## When is the local authority duty triggered?

Local authority duties to step in to meet needs under Section 48 of the Care Act will only be triggered when a service has closed following the business failure of the registered provider. The conditions that must be satisfied for us to inform the affected authorities that failure is likely are different to the conditions that need to be satisfied for local authorities to step in and meet needs. As set out above, business failure and service closure do **not** need to occur for our duty to notify to be triggered. However, the duty of local authorities to step in, under Section 48 of the Care Act, is only triggered once a service stops being delivered following business failure.

It will be for those local authorities to decide how to discharge their obligations under Section 48 in situations where, for example, the authority does not commission from the affected provider, but the authority is aware that services have been commissioned by other local authorities (for example, another local authority has placed someone in residential care out of area). The Department of Health has issued guidance on this issue[3].

### What we expect from providers

Following notification to local authorities that business failure is likely, providers are still subject to the requirements of the Market Oversight scheme, so still need to comply with our requests for information and must continue to engage with us so that we can continue to assess financial sustainability and the ability to continue to deliver regulated activities. We also expect providers to enter into open dialogue with the affected local authorities. We will explore this in more detail in the next section.

[3] See chapter 5 in: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366104/43380_23902777_Care_Act_Book.pdf

## Beyond stage 6: Roles in the event of business failure – Proposed working arrangements

**What will we do in the event of business failure?**

Every business failure scenario has the potential to be different, in terms of the complexity and scale of impact on the people using the service. As set out in the section on notifications, above, we will assess each case and come to a judgement about the impact of the failure.

Because each case is likely to be different, it will need to be responded to in different ways. Depending on the scale of the failure, an agency may need to be identified which will have a lead role in the overall response, ensuring efforts are coordinated. This may be a role that we sometimes play and sometimes it may fall to the Department of Health. Our rule of thumb is that the Department of Health will lead if the failure involves the largest providers or a provider that operates in numerous local authority areas. Failure situations may be highly fluid and so the on-going situation would need to be monitored to make sure leadership was concentrated at the correct level.

In every case, and as a minimum, our role is split into four categories:

- communication
- information sharing
- registration
- monitoring of services.

## Communication

The Care Act[4] enables us to require from the provider, or any other person involved in the provider's business, any information that we consider may assist local authorities in ensuring continuity of care. Where we hold information, from whatever source, which we believe will assist local authorities in this way, then we must[5] share this with the relevant local authorities.

We will work very closely with the provider and with the Insolvency Practitioners dealing with the failure and will make sure that dialogue is maintained with these two. We will also make sure that the local authorities which are affected are kept up to date, as appropriate. The information we will share may include:

- the intentions of the appointed Insolvency Practitioner (IP)

[4] Section 56(3) of The Care Act (2014)
[5] Section 56(4) of The Care Act (2014)

- where not commercially sensitive and to the extent possible, the current progress of negotiations between the IP and key stakeholders (for example, prospective purchasers of the business, suppliers, landlords, lenders, shareholders, any other creditors, local authorities and other care providers)
- the likely timescales and impact of the above on people using the service and local authorities to which the temporary duty applies.

By looking at the response to the collapse of Southern Cross and through consultation with stakeholders, we identified the following agencies as being likely to be involved to varying extents in the response to failed provider in the Market Oversight scheme either locally, regionally or nationally:

- Department of Health (DH) & Ministers
- CQC
- The Association of Directors of Adult Social Services (ADASS)
- Local Government Association
- Individual local authorities
- Insolvency Practitioners
- Failed provider
- Other care providers
- NHS England
- Clinical Commissioning Groups
- People who use services, their families and carers
- Devolved administrations/regulators
- Landlords
- Lenders
- Care provider representative organisations
- Other regulators (e.g. Monitor, the Homes and Communities Agency)
- Advocacy groups
- Trade unions

We will maintain an up-to-date view of the latest developments. And will, in conjunction with DH and ADASS agree the content of any wider communications that is shared with the agencies listed above.

We will decide how best to share information on the basis of what we consider is the most appropriate and most effective, based on the circumstances. Any media appearances, briefings or announcements we make will be coordinated with the other agencies involved and will be consistent with them. Anyone who contacts us during this period will receive information consistent with that shared through other means and by these other agencies.

In conjunction with DH and ADASS, we will be responsible for communication nationally, where necessary, while local authorities will be responsible for local and regional messaging.

## Information sharing

We hold detailed information about the quality of all regulated care services in England. We will publish this in a consolidated and user-friendly format on our website so that it is freely available to the public, to local authority commissioners, to NHS commissioners, devolved administrations, etc. This will support and inform choice.

We will be a source of information for the public where changes in provider or specific care setting ownership have occurred.

## Registration

Depending on the outcome of negotiations between the Insolvency Practitioner and stakeholders such as the prospective buyers, other care providers, lenders and landlords, we may need to carry out registration activity such as new registrations, variations or cancellations.

Where new registrations or variations in registration are required and where these are vital in ensuring continuity of care to people using services, to avoid regulated care being delivered by unregistered providers, this will be prioritised. The speed at which we will do this will not impair our ability to apply the necessary level of scrutiny required for registration.

Insolvency scenarios are fluid in nature and this can present difficulties for us in carrying out our regulatory functions. For instance, where an administrator appoints ‘care taker’ operators in care services, there may be a period where there is no legally accountable “nominated individual” who can act as a point of contact for us on regulatory matters[6]. However, in matters such as these, and where possible, we will use discretion and act in the best interests of people using the service.

[6] Section 5(2) The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010

# 3. Operational arrangements

## Transition from the Department of Health's (DH) financial oversight scheme

Since 2012, DH has been monitoring the financial sustainability of the five largest providers of residential care in England. DH has been supported in this by BDO, a management consultancy with expertise of financial risk assessment, accounting, insolvency and restructuring. These arrangements are voluntary and DH has no legal powers to require providers to provide information or to participate in the process. Nevertheless, providers have done so willingly.

Along with the other providers to which Market Oversight applies, these five providers will be formally notified that they are subject to the scheme following 6 April. However, DH will continue to monitor these providers, through the assistance of BDO and in close collaboration with us until 30 September 2015.

If one of these providers appears likely to fail financially, DH will lead the negotiations in response but we will be closely involved as we hold the legal powers. It is important to stress that DH will be advising us. We will have responsibility for taking key decisions, such as when engagement with stakeholders needs to happen or when local authorities need to be informed that business failure is likely, for example.

BDO's information requirements differ to ours. During the transition period, the five providers will continue to meet BDO's information requirements. By 1 May 2015, we will agree with DH when the providers should move to our information requirements. In coming to a view, we will involve the providers affected.

## Working with other regulators to reduce provider burden

Some providers in the Market Oversight scheme might also be subject to financial regulation by other agencies. For instance, Monitor, the Homes and Communities Agency (HCA), the Charities Commission or care regulators in Scotland, Wales or Northern Ireland.

Where this is the case, we will work with those agencies to reduce the need for providers to supply the same information to more than one regulator.

The extent to which this is possible will depend on a number of factors such as:

- **Structure of the provider's business or group**: The other regulator may be collecting information which relates to another part of a provider's business, such

as its social housing business, which we cannot use to fulfil our statutory functions as part of Market Oversight.

- **Nature of data being collected**: The other regulators may use different information to inform their assessments of providers.
- **The extent to which the other regulator's assessment of risk accords with our own**: If there are differences, the other regulator might be requesting information on a less frequent basis or at a lower level of detail than we require.

We will agree and keep up to date information sharing agreements with any other regulators that assess providers where this will reduce provider burden and allow us to carry out our statutory function to assess providers' financial sustainability.

As part of its broader commitment to transparency, CQC publishes all such information sharing agreements, protocols and memoranda of understanding.

# Appendix A: Glossary of terms

| Term | Definition |
| --- | --- |
| **Corporate provider** | A company which operates at least one registered provider but is not itself required to register with CQC. |
| **EBITDA** | Earnings before Interest, Tax, Depreciation and Amortisation |
| **Group Undertaking** | As defined in section 1161(5) of the Companies Act 2006. Can be either a parent company or the subsidiary of a parent company. |
| **KPI** | Key Performance Indicator |
| **Non-residential care service** | Service which provides regulated care to people in their own homes such as domiciliary care agency or supported living service. |
| **Operational gearing** | The relationship between fixed and variable costs. Higher fixed costs mean greater operational gearing and vice versa. High gearing makes a firm's profits sensitive to a change in sales. |
| **Provider** | Depending on context, refers to either a registered provider or a corporate provider |
| **Registered Provider** | A company which is registered by CQC to deliver regulated activities. |
| **Residential Care Services** | Care home accommodation for persons who require nursing or personal care. |

# Appendix B: The Care Act (2014) and The Care and Support Regulations (2014) in relation to Market Oversight

**The Care Act (2014):**

**Section 54: Determining whether criteria apply to care provider**

(1)The Care Quality Commission must determine, in the case of each registered care provider, whether the provider satisfies one or more of the criteria specified in regulations under section 53.

(2)If the Commission determines that the provider satisfies one or more of the criteria, section 55 applies to that provider unless, or except in so far as, regulations under section 53(4) provide that it does not apply.

(3)Where section 55 applies to a registered care provider (whether as a result of subsection (2) or as a result of regulations under section 53(5)), the Commission must inform the provider accordingly.

**Section 55: Assessment of financial sustainability of care provider**

(1)Where this section applies to a registered care provider, the Care Quality Commission must assess the financial sustainability of the provider's business of carrying on the regulated activity in respect of which it is registered.

(2)Where the Commission, in light of an assessment under subsection (1), considers that there is a significant risk to the financial sustainability of the provider's business, it may—

(a)require the provider to develop a plan for how to mitigate or eliminate the risk;

(b)arrange for, or require the provider to arrange for, a person with appropriate professional expertise to carry out an independent review of the business.

(3)Where the Commission imposes a requirement on a care provider under subsection (2)(a), it may also require the provider—

(a)to co-operate with it in developing the plan, and

(b)to obtain its approval of the finalised plan.

(4)Where the Commission arranges for a review under subsection (2)(b), it may recover from the provider such costs as the Commission incurs in connection with the arrangements (other than its administrative costs in making the arrangements).

(5)Regulations may make provision for enabling the Commission to obtain from such persons as it considers appropriate information which the Commission believes will assist it to assess the financial sustainability of a registered care provider to which this section applies.

(6)Regulations may make provision about the making of the assessment required by subsection (1).

(7)The Commission may consult such persons as it considers appropriate on the method for assessing the financial sustainability of a registered care provider's business; and, having done so, it must publish guidance on the method it expects to apply in making the assessment.

**Section 56: Informing local authorities where failure of care provider likely**

(1)This section applies where the Care Quality Commission is satisfied that a registered care provider to which section 55 applies is likely to become unable to carry on the regulated activity in respect of which it is registered because of business failure as mentioned in section 48.

(2)The Commission must inform the local authorities which it thinks will be required to carry out the duty under section 48(2) if the provider becomes unable to carry on the regulated activity in question.

(3)Where the Commission considers it necessary to do so for the purpose of assisting a local authority to carry out the duty under section 48(2), it may request the provider, or such other person involved in the provider's business as the Commission considers appropriate, to provide it with specified information.

(4)Where (as a result of subsection (3) or otherwise) the Commission has information about the provider's business that it considers may assist a local authority in carrying out the duty under section 48(2), the Commission must give the information to the local authority.

(5)Regulations may make provision as to the circumstances in which the Commission is entitled to be satisfied for the purposes of subsection (1) that a registered care provider is likely to become unable to carry on a regulated activity.

(6)The Commission may consult such persons as it considers appropriate on the methods to apply in assessing likelihood for the purposes of subsection (1); and, having carried out that consultation, it must publish guidance on the methods it expects to apply in making the assessment.

**Section 57: Sections 54 to 56: supplementary**

(1)For the purposes of Part 1 of the Health and Social Care Act 2008, the duties imposed on the Care Quality Commission under sections 54(1) and 55(1) are to be treated as regulatory functions of the Commission.

(2)For the purposes of that Part of that Act, the doing by the Commission of anything for the purpose of assisting a local authority to carry out the duty under section 48(2) is to be treated as one of the Commission's regulatory functions.

(3)For the purposes of sections 17 and 18 of that Act (cancellation or suspension of registration under Part 1 of that Act), a requirement imposed on a registered care provider under or by virtue of any of sections 54 to 56 (or by virtue of subsection (1) or (2)) is to be treated as a requirement imposed by or under Chapter 6 of Part 1 of that Act.

(4)The Commission must, in exercising any of its functions under sections 54 to 56, have regard to the need to minimise the burdens it imposes on others.

# The Care and Support Regulations (2014)

**The Care and Support (Business Failure) Draft Regulations 2014**

Made - - - - ***

Coming into force in accordance with regulation 1(2) and (3)

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 52(12) and 125(7) and (8) of the Care Act 2014( ).

In accordance with section 125(4)(f) of the Care Act 2014, a draft of these Regulations was laid before Parliament and was approved by a resolution of each House of Parliament.

In accordance with section 125(9) of the Care Act 2014, the Secretary of State has consulted the Welsh Ministers and the Department for Health, Social Services and Public Safety in Northern Ireland before making these Regulations.

Citation, commencement and interpretation

**1.**—(1) These Regulations may be cited as the Care and Support (Business Failure) Regulations 2014.

(2) Subject to paragraph (3), these Regulations come into force on the day on which section 52(12) of the Act comes fully into force( ).

(3) Insofar as these Regulations make provision for the purposes of—

(a) section 50 of the Act( ), and

(b) section 52 of the Act insofar as it relates to section 50,

they come into force for those purposes on the day on which section 50 of the Act comes fully into force.

(4) In these Regulations—

“the Act” means the Care Act 2014;

“the 1986 Act” means the Insolvency Act 1986( );

“the 1989 Order” means the Insolvency (Northern Ireland) Order 1989( );

“a members’ voluntary winding up” means a winding up where a statutory declaration has

been made under section 89 of the 1986 Act or article 75 of the 1989 Order( );

“a provider” means—

(a) a registered care provider( ),

(b) a person registered under Part 2 of the Care Standards Act 2000( ) in respect of an establishment or agency, or

(c) a person registered under Part 3 of the Health and Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003( ) in respect of an establishment or agency;

“the relevant amount” means the amount specified in section 123(1)(a) of the 1986 Act (definition of inability to pay debts) or article 103(1)(a) of the 1989 Order (definition of inability to pay debts; the statutory demand) as the case may be.

**Business failure**

**2.**—(1) For the purposes of sections 48 and 50 to 52 of the Act—

(a) business failure has the meaning given in paragraphs (2) to (5); and

(b) a provider is to be treated as unable to carry on a regulated activity( ) or to carry on or manage an establishment or agency because of business failure if the provider’s inability to do so follows business failure.

(2) Where a provider is not an individual, business failure means that, in respect of that provider—

(a) the appointment of an administrator (within the meaning given by paragraph 1(1) of Schedule B1 to the 1986 Act( ) or paragraph 2(1) of Schedule B1 to the 1989 Order( )) takes effect;

(b) a receiver is appointed;

(c) an administrative receiver as defined in section 251 of the 1986 Act( ) or article 5 of the 1989 Order is appointed;

(d) a resolution for a voluntary winding up is passed other than in a members' voluntary winding up;

(e) a winding up order is made;

(f) an order by virtue of article 11 of the Insolvent Partnerships Order 1994 (joint bankruptcy petition by individual members of insolvent partnership)( ) is made;

(g) an order by virtue of article 11 of the Insolvent Partnerships Order (Northern Ireland) 1995 (joint bankruptcy petition by individual members of insolvent partnership)( ) is made;

(h) the charity trustees of the provider become unable to pay their debts as they fall due;

(i) every member of the partnership (in a case where the provider is a partnership) is adjudged bankrupt; or

(j) a voluntary arrangement proposed for the purposes of Part 1 of the 1986 Act( ) or Part 2 of the 1989 Order has been approved under that Part of that Act or Order.

(3) In relation to a provider who is an individual, business failure means that—

(a) the individual is adjudged bankrupt; or

(b) a voluntary arrangement pursuant to Part 8 of the 1986 Act or Part 8 of the 1989 Order is proposed by or entered into by the individual.

(4) For the purposes of paragraph (2)(h), a person is a charity trustee of a provider if—

(a) the provider is a charity that is unincorporated; and

(b) the person is a trustee of that charity.

(5) For the purposes of paragraph (2)(h), the charity trustees of a provider are to be treated as becoming unable to pay their debts as they fall due if—

(a) a creditor to whom the trustees are indebted in a sum exceeding the relevant amount then due has served on the trustees a written demand requiring the trustees to pay the sum so due and the trustees have for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) in England and Wales, execution or other process issued on a judgment, decree or order of a court in favour of a creditor of the trustees is returned unsatisfied in whole or in part;

(c) in Scotland, the inducime of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made; or

(d) in Northern Ireland, a certificate of unenforceability has been granted in respect of a judgment against the trustees.

Signed by authority of the Secretary of State for Health

Name

Minister of State

Date Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

Sections 48 to 52 of the Care Act 2014 ("the Act") impose duties ("temporary duties") on local authorities in England and Wales, and on Health and Social Care trusts in Northern Ireland ("HSC trusts"), to meet care and support needs of adults, or support needs of carers, in circumstances where registered providers of care are unable to carry on because of "business failure".

These Regulations make provision as to the interpretation, for those purposes, of "business failure" and as to circumstances in which a person is to be treated as unable to do something because of "business failure". (As regards Scotland, certain duties are imposed on local authorities under Part 2 of the Social Work (Scotland) Act 1968.)

Regulation 2 sets out the events which constitute business failure for the purposes of the temporary duties on local authorities in England and Wales, and on HSC trusts.

In relation to a provider, other than an individual, registered in England, Wales or Northern Ireland, business failure consists of—

— the appointment of an administrator;

— the appointment of a receiver;

— the appointment of an administrative receiver;

— the passing of a resolution for a voluntary winding up in a creditors' voluntary winding up;

— the making of a winding up order;

— the making of bankruptcy orders where individual members of a partnership present a joint bankruptcy petition;

— in relation to an unincorporated charity, the charity trustees becoming unable to pay their debts as they fall due;

— all members of a partnership being adjudged bankrupt; or

— a voluntary arrangement being approved under the Insolvency Act 1986 ("the 1986 Act") or the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order").

In relation to a provider who is an individual registered in England, Wales or Northern Ireland, business failure consists of the individual being adjudged bankrupt or proposing or entering into an individual voluntary arrangement under Part 8 of the 1986 Act or Part 8 of the 1989 Order.

Under the Act, the temporary duties are triggered where a registered provider becomes unable to carry on a regulated activity or to carry on an establishment or agency because of business failure. Regulation 2(1)(b) provides that a provider is to be treated as unable to carry on a regulated activity or to carry on or manage an establishment or agency because of business failure if the provider's inability to do so follows business failure.

A separate impact assessment has not been prepared for these Regulations. These Regulations are part of a package of legislative measures and the relevant impact assessment can be requested via careactconsultation@dh.gsi.gov.uk or Department of Health, Richmond House, 79 Whitehall, London SW1A 2NS and is available online at https://www.gov.uk/government/organisations/department-of-health.

**The Care and Support (Market Oversight Criteria) Draft Regulations 2014**

*Made - - - -* ***

*Coming into force in accordance with regulation 1(1)*

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 53(1) and 125(7) and (8) of the Care Act 2014([7]).

([7]) 2014 c.23 ("the Act"). The powers to make regulations are exercisable by the Secretary of State, *see* section 125(1).

The Secretary of State has had regard to the matters specified in section 53(2) of the Care Act 2014 in making these Regulations.

In accordance with section 125(4)(g) of the Care Act 2014, a draft of these Regulations was laid before Parliament and was approved by a resolution of each House of Parliament.

**Citation, commencement and interpretation**

**1.**—(1) These Regulations may be cited as the Care and Support (Market Oversight Criteria) Regulations 2014 and come into force immediately after section 53(1) of the Care Act 2014([8]) comes fully into force.

(2) In these Regulations—

"the Act" means the Care Act 2014;

"the 2014 Regulations" means the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014([9]);

"group undertaking" has the meaning given by section 1161(5) of the Companies Act 2006([10]);

"undertaking" has the meaning given by section 1161(1) of the Companies Act 2006.

Providers of personal care (non-residential)

**2.**—(1) Section 55 of the Act applies to a registered care provider(**11**) who is not a local authority([12]) and who is registered in respect of the carrying on of the regulated activity set out in paragraph 1 of Schedule 1 to the 2014 Regulations (personal care) where—

(a) the number of hours of regulated care provided by the registered care provider in a week is 30,000 or more; or

(b) the number of people to whom regulated care is provided by the registered care provider in a week is 2,000 or more; or

(c) the number of—

(i) people to whom regulated care is provided by the registered care provider in a week is 800 or more; and

(ii) hours of regulated care provided by that provider in the same week divided by that number of people exceeds 30.

(2) In this regulation, "regulated care" means care provided in connection with the carrying on of the regulated activity set out in paragraph 1 of Schedule 1 to the 2014 Regulations (personal care).

(3) For the purpose of this regulation, where a registered care provider is an undertaking—

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([8]) Section 53(1) was commenced on 1 October 2014 for the purposes of making regulations by S.I. 2014/2473.

([9]) S.I. 2014/2936.

([10]) 2006 c.46. *See* S.I. 2008/1911 as to the application of section 1161(5) with modifications to limited liability partnerships.

([11]) *See* section 48(1) of the Act for the meaning of "registered care provider".

([12]) *See* section 1(4) of the Act for the meaning of "local authority"; the definition is limited to local authorities in England.

(a) the hours of regulated care provided by the provider include hours of regulated care provided by any group undertaking of the provider; and

(b) the number of people to whom regulated care is provided by the provider includes people to whom regulated care is provided by any group undertaking of the provider.

**Providers of residential care**

**3.**—(1) Section 55 of the Act applies to a registered care provider who is not a local authority and who is registered in respect of the carrying on of the regulated activity set out in paragraph 2 of Schedule 1 to the 2014 Regulations (accommodation for persons who require nursing or personal care) where the bed capacity of that provider is—

(a) 1,000 or more but less than 2,000 and where—

(i) the bed capacity of that provider is at least 1 in each of 16 or more local authority areas; or

(ii) the bed capacity of that provider in each of 3 or more local authority areas exceeds 10 per cent. of the total bed capacity in each of those local authority areas; or

(b) 2,000 or more.

(2) In this regulation—

"bed capacity" means the number of beds made available by a registered care provider in connection with the carrying on of the regulated activity set out in paragraph 2 of Schedule 1 to the 2014 Regulations (accommodation for persons who require nursing or personal care); and

"total bed capacity" means the number of beds made available by all registered care providers in connection with the carrying on of the regulated activity set out in paragraph 2 of Schedule 1 to the 2014 Regulations (accommodation for persons who require nursing or personal care).

(3) For the purpose of this regulation, where the registered care provider is an undertaking, the bed capacity of the provider includes the bed capacity of any group undertaking of the provider.

Signed by authority of the Secretary of State for Health.

*Name*
Minister of State
Date Department of Health

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

Section 54(1) of the Care Act 2014 (c.23) ("the Act") imposes a duty on the Care Quality Commission to determine whether a registered care provider satisfies the criteria for entry into the market oversight regime (see section 53 of the Act). These Regulations set out the entry criteria to the market oversight regime, which is a regime to monitor the financial sustainability of certain difficult to replace registered care providers.

Regulation 2 sets out the criteria for entry applicable to providers of personal (non-residential) care, that is, providers who are registered in respect of the carrying on of the regulated activity set out in paragraph 1 of Schedule 1 to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the 2014 Regulations"). The criteria will be satisfied where a provider is not a local authority and where they:

— provide at least 30,000 hours of care in a week anywhere in England; or

— provide at least 2,000 people with care in a week anywhere in England; or

— provide at least 800 people with care in a week anywhere in England and the number of hours of care provided in the same week divided by that number of people exceeds 30.

Regulation 2 also provides that the criteria may be met by counting the hours of care provided by any group undertaking of the relevant provider or counting the people to whom care is provided by any such group undertaking.

Regulation 3 sets out the criteria for entry applicable to providers of residential care, that is, providers who are registered in respect of the carrying on of the regulated activity set out in paragraph 2 of Schedule 1 to the 2014 Regulations. The criteria will be satisfied where a provider is not a local authority and where they have a bed capacity:

— of at least 2,000 anywhere in England; or

— of between 1,000 to 1,999 overall, with 1 bed or more in at least 16 local authorities in England; or

— of between 1,000 to 1,999 anywhere in England and where their bed capacity in each of 3 or more local authorities in England exceeds 10 per cent. of the total bed capacity in each of those local authorities.

Regulation 3 also provides that the bed capacity of a provider includes the bed capacity of any group undertaking.

A separate impact assessment has not been prepared for these Regulations. These Regulations are part of a package of legislative measures and the relevant impact assessment can be requested via careactconsultation@dh.gsi.gov.uk or the Department of Health, Richmond House, 79 Whitehall, London, SW1A 2NS and is available online at https://www.gov.uk/government/organisations/department-of-health.

**The Care and Support (Market Oversight Information) Regulations 2014**

Made - - - - ***

Laid before Parliament ***

Coming into force in accordance with regulation 1(1)

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 55(5), 125(7) and (8) of the Care Act 2014( ).

Citation, commencement and interpretation

**1.**—(1) These Regulations may be cited as the Care and Support (Market Oversight Information) Regulations 2014 and come into force immediately after section 55(5) of the Care Act 2014 comes fully into force( ).

(2) In these Regulations—

“the Act” means the Care Act 2014;

“the Commission” means the Care Quality Commission( );

“group undertaking” has the meaning given by section 1161(5) of the Companies Act 2006( ) and “undertaking” (except in the case of an information undertaking) has the meaning given by section 1161(1) of that Act;

“information” means any information, documents, records or other material;

“information undertaking” is to be construed in accordance with regulation 2.

Undertaking to provide information

**2.**—(1) This regulation applies where a registered care provider( ) to whom section 55 of the Act applies is an undertaking.

(2) The Commission may require the registered care provider to obtain from a group undertaking of the provider an “information undertaking” to provide the Commission with such information as the Commission requests.

(3) An information undertaking must be in a form which is legally enforceable by the registered care provider.

Form of the information undertaking

3. The Commission may specify the form of an information undertaking and may provide in particular that—

(a) information must be provided at such times and such places as may be specified by the Commission;

(b) an explanation of any information must be provided at such times and such places as may be specified by the Commission;

(c) information and explanations must be provided in such manner or format as may be specified by the Commission;

(d) the group undertaking must co-operate with the Commission in connection with providing information and explanations; and

(e) information and explanations must be complete and accurate.

Time for provision of information undertaking, etc.

**4.**—(1) The registered care provider must obtain the information undertaking within such period as the Commission specifies.

(2) The registered care provider must send to the Commission a copy of the information undertaking within such period as the Commission specifies.

(3) The information undertaking must remain in force for as long as—

(a) the person required to provide information remains a group undertaking of the registered care provider; and

(b) section 55 of the Act continues to apply to the registered care provider.

Breach, etc.

**5.**—(1) The registered care provider must inform the Commission immediately in writing if it becomes aware that—

(a) the information undertaking has ceased to be in force;

(b) the information undertaking has ceased to be legally enforceable; or

(c) any terms of the information undertaking have been breached.

(2) The registered care provider must comply with any request made by the Commission to enforce the information undertaking.

Signed by authority of the Secretary of State for Health

Name

Minister of State

Date Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

Section 55(1) of the Care Act 2014 (c.23) imposes a duty on the Care Quality Commission to assess the financial sustainability of a registered care provider subject to the market oversight regime. These Regulations make provision for the Commission to obtain information from persons other than the registered care provider to assist it in making this assessment.

Regulation 2 provides that the Commission may require a registered care provider to obtain from a group undertaking, a legally enforceable undertaking to provide information. Regulations 3 to 5 make further provision in relation to the information undertaking.

A separate impact assessment has not been prepared for these Regulations. These Regulations are part of a package of legislative measures and the relevant impact assessment can be requested via careactconsultation@dh.gsi.gov.uk or the Department of Health, Richmond House, 79 Whitehall, London, SW1A 2NS and is available online at https://www.gov.uk/government/organisations/department-of-health.

# Appendix C: Arrangements for ‘passporting’ providers into the market oversight regime who do not meet the entry criteria set out in regulations

Section 53(5) of the Care Act enables the Secretary of State for Health to specify in regulations care providers to be subject to the market oversight regime, irrespective of whether they meet the objective entry criteria set out in regulations. From time to time, it may be appropriate for the Secretary of State to use these powers. This appendix sets out examples where these powers may be used and the process that will be followed.

**Care providers recommended to the Secretary of State because they are deemed ‘specialist’**

Alongside those care providers that are large, geographically concentrated and spread across the country, it is intended that specialist providers should be subject to monitoring by the CQC.

‘Specialist providers’ should be taken to mean that the services a provider delivers are so specialised that it would be difficult for local authorities to replace them temporarily were they to fail. Many of these providers will already qualify for monitoring as they are likely to be part of a larger care organisation that also delivers significant levels of non-specialist care and so meets the entry criteria set out in regulations – those providers will face no additional cost burden. However, there may be a very small number of additional providers that do not meet the criteria relating to size, geographic concentration and spread but where local authorities would benefit from early warning of their likely failure regardless.

Should a local authority be required to temporarily strep in and meet needs where a provider delivering specialist services because of business failure, replacement care may be arranged temporarily in different ways. For example, for a few weeks in a different setting with additional care staff allocated to ensure people’s needs are met, so the appropriateness of CQC oversight may therefore be low. For that reason, the number of specialist providers that are likely to be deemed ‘difficult to replace’ is small.

It has not been possible to develop objective criteria to be included in the entry criteria Regulations relating to ‘specialism’ largely because there is no agreed definition of the types of specialist services that local authorities would find temporarily difficult to replace were they to fail. The Government will instead consider using the powers set out above to make Regulations making those specific providers subject to the CQC’s scheme.

The Department of Health will set up a panel, selected because of their expertise in and knowledge of the specialist care sector ("specialist panel"), to assist the Secretary of State in making his decision.

The specialist panel will meet and make provisional recommendations of additional providers to be overseen by the CQC. The providers featuring on the provisional recommendation list will be notified of this by the Department of Health and that they have 28 working days to make any objections known to the specialist panel. They will not be subject to the regime during this period so will not be required to submit any financial information to the CQC. The specialist panel will then reconvene to consider any relevant evidence, including any objections made by those providers and produce a final list recommended for inclusion and the reasons for doing so. The Secretary of State will then consider this advice and any other evidence when making the final decision. Should he decide to 'passport' any providers into the regime via this route, the providers in question will be notified by the Department as to the date they will be subject to financial monitoring by the CQC. Those providers will not have the opportunity to make objections to the Secretary of State's decision.

The process will then be repeated annually with the specialist panel considering whether any additional providers should be subject to CQC monitoring or any providers included in the scheme via this route should be taken out of the scheme. In doing so, the specialist panel will consider any changes to the scale of a provider's business and whether the risk to local authorities remains. The Secretary of State can consider any such request and has powers to add or remove providers from the scheme. Should any changes be needed, Regulations will be laid before Parliament amending the original set of Regulations.

When in the regime, the CQC will work with the provider to assess the level of risk posed. This will be done in a proportionate way that recognises that the information needed to make a risk assessment might not be routinely available, and that the information sought from smaller specialist providers should be proportionate to the risk of their failure.

**Care providers recommended to the Secretary of State for alternative reasons**

From time to time, it is possible that the Secretary of State will receive requests to use his powers to passport providers into the market oversight regime. Requests may well come from any number of individuals or organisations and the evidence to support such requests may vary in terms of the strength of argument that the provider is in fact difficult to replace and should therefore be subject to financial monitoring.

Where such a request is received and relates directly to the specialist nature of the services the care provider in question delivers, the Department of Health will pass it on, along with any supporting evidence, to the specialist panel to consider whether the request should be taken forward and the process outlined in the above section followed. Where the specialist panel decides against taking forward the

recommendation, the Department of Health will write to the individual or organisation making the request notifying them of the decision and the reasons.

Where such a request is received but does not directly relate to the specialist nature of the services a provider delivers, the Department of Health will use its discretion in deciding whether to take forward the request and, depending on the strength of the case put forward by the individual or organisation in question. For example, the provider's business is structured in a way that means that it does not satisfy the objective criteria set out in regulations but it would nonetheless be difficult to replace. Where the Department of Health decides against taking forward the recommendation, it will write to the individual or organisation making the request notifying them of the decision and the reasons. Where the Department of Health is minded to submit the recommendation to the Secretary of State to assist him in making the final decision, the Department of Health will write to the provider, notifying them that they are the subject of a recommendation and the reasons for this and invite them to make any objections known and submit supporting evidence. This information will be forwarded to the recommending individual or organisation to consider and decide whether they wish to continue with the recommendation. Should they wish to do so, the Secretary of State will consider this advice and any other evidence when making the final decision where the process outlined in the above section will be followed.

Should a provider enter the regime via this route, the Department of Health will review the decision on an annual basis which will include considering any new evidence that may arise supporting the case to take the provider out of the regime.

# Appendix D: Financial and quality indicators

**Primary Trading indicators**

| Indicator | Formula | Purpose |
| --- | --- | --- |
| Sales movement | Current period sales compared to budget and prior year | To understand if a business is growing or in decline, and is performing in-line with Management's expectations. A deteriorating trend may provide early warning for future financial problems. |
| EBITDAR | Earnings before Interest, Tax, Depreciation, Amortisation, Rent and Exceptional Items | To understand the underlying profitability of a business after adjusting for non-cash items, rent and exceptional items. |
| EBITDAR movement | Current period EBITDAR compared to budget and prior year | To understand if profitability is increasing or decreasing, and is performing in-line with Management's expectations, in absolute terms. A deteriorating trend may provide early warning for future financial problems. |
| EBITDAR margin | EBITDAR divided by Sales | To understand the operational gearing of the provider and how susceptible profitability is to sales and cost fluctuations. A low EBITDAR margin may mean higher risk. |
| EBITDAR margin movement | Current period EBITDAR margin compared to budget and prior year | To understand if profitability is increasing or decreasing, and is performing in-line with Management's expectations, in relative terms. A deteriorating trend may provide early warning for future financial problems. |
| Occupancy levels (residential only) | Occupied beds divided by available beds | To understand occupancy trends and to compare to market benchmarks, taking into account different types of services |
| Cash Flow Available for Debt Service ("CFADS") | See Financial Oversight Submission for definition | To ensure the provider is cash generative and is able to pay its debts as they fall due. |
| Repairs and Maintenance Capex spend per bed | Building repairs and maintenance costs plus Non-Discretionary Maintenance Capex divided by the number of Available Beds and the number of weeks in the relevant period | To understand if spend is increasing or decreasing, and to compare to market benchmarks. A significant reduction in capital expenditure, or below average spend, may signify cash flow pressures. |
| Non-payment of CQC registration fees | Per registration information | This could be an indicator of cash flow pressures. |

**Gearing indicators**

| Indicator | Formula | Description |
|---|---|---|
| EBITDA Leverage | Net Debt divided by EBITDA | To assess if the provider has too much debt when compared to standard bank lending criteria. Business failure risk increases as debt increases because it reduces the flexibility of a Provider to respond to a deterioration in trading performance. Net debt levels above 6x EBITDA may require further investigation to ensure it is sustainable. The definition of Net debt will be agreed with the provider at the outset due to the variation in financing structures (e.g. shareholder loans) and associated risk profiles. |
| Adjusted EBITDA Leverage | Lease adjusted Net Debt divided by EBITDAR | This is similar to EBITDA leverage, except Net debt also includes the net present value of long term operating lease obligations (i.e. property leases) and rent has been excluded from EBITDA. Operating lease obligations are not included in the balance sheet under accounting rules, however, these are contractual payments which will need to be funded from future profits and may have an impact on business failure risk. |
| Net Tangible Worth | Total tangible assets minus total liabilities and deferred tax | To understand the tangible net asset position of the provider, to assess the level of security available to support debt and to ensure there are sufficient assets to meet liabilities as they fall due. |
| Loan to Value | Net Debt divided by Asset Value multiplied by 100% | To understand the level of security available to support debt. Were available, this will be based on independent valuations rather than the asset value in the balance sheet, as this may provide a more accurate view of security value. |

**Debt payment indicators**

| Indicator | Formula | Description |
|---|---|---|
| Interest Cover | EBITDA divided by Finance Charges | To understand if the provider is generating sufficient profit to pay the interest on its debt. |
| Rental Cover | EBITDAR divided by Rent | To understand if the provider is generating sufficient profit to pay its operating lease obligations as they fall due. Asset type will be taken into |

| | | account. |
|---|---|---|
| Cash Flow Cover | CFADS divided by Debt Service Costs | To understand if the provider is generating sufficient cash to pay all of its debt (interest and capital repayments) and rent as they fall due for payment. |
| Refinancing date | Per submission | To understand when loans on the balance sheet are due for repayment and when they need to be refinanced. |

**Qualitative risk questions**

1. Are you in breach of Bank Covenants?
2. Has your Lender requested an Independent Business Review?
3. Have you received a Reservation of Rights letter from your Lenders?
4. Are you paying your rental payments in full to your Landlords?
5. Are you in restructuring negotiations with your Lenders and/or Landlords?
6. Has your debt been sold to a third party?
7. Have you entered into a “Time To Pay” arrangement with HMRC?
8. Have you received a qualified audit report or an "emphasis of matter" statement from your Auditor in your statutory accounts in the last two years?

**Quality Indicators**

- Location and domain-level quality ratings.
- Numbers of locations fully compliant out of the total number of locations.
- Number of non-compliant locations by outcomes area.
- Numbers of locations without a registered manager.
- Statutory notifications outliers – unusually high or low levels of deaths, serious injury, abuse and locations making no notifications at all.
- Numbers of enforcement actions issued.
- Numbers of safeguarding and whistle-blowing alerts.
- Number of complaints about the provider.
- Staffing information (numbers and qualifications) from Skills for Care.

# Appendix E: Example risk scenarios and CQC's likely response

The following scenarios relate to a hypothetical provider and describe its journey through the Market Oversight assessment process. The CQC responses are what we would be likely to do but our response will always be tailored to specific circumstances and so, in real situations, may differ slightly to what is shown here.

## Scenario 1

A provider has submitted its Financial Oversight Submission Template data and initial analysis has highlighted the following:

- The Business has been expanding by acquiring several smaller businesses. This has been largely funded using bank debt provided by a syndicate of three lenders.
- Debt levels are high with EBITDA Leverage exceeding 7x.
- Loan capital repayments increase over time to reflect the forecast increase in profitability due to the cost savings expected from combining the businesses. As such Cash Flow Cover is greater than 1.1x at present (i.e. debts can be serviced).
- A Business Plan is available to support the loan repayment profile.
- The business has a good quality track record.

**Our likely response:**

- ➢ Provider moves to stage 4 of the operating model: Provider engagement on risk.
- ➢ CQC requests the provider risk assessment meeting to understand the reasons for the high debt level and progress against the Business Plan.
- ➢ A copy of the Business Plan is requested to check loan repayments can be repaid.
- ➢ Business returns to regular monitoring with further risk analysis performed each quarter to monitor trading trends and performance against the business plan.

## Scenario 2

- Quality indicators are showing problems in one of the acquired businesses.
- Trading indicators show a decline in EBITDAR (i.e. profitability).
- Cash Flow Cover has fallen below 1x and there is a risk the next loan repayment cannot be made in full.
- Via the CQC operational lead, management have stated that the decline in performance is due to isolated operational problems which are in the process of being rectified. Also, shareholders have agreed to inject some cash to cover the next loan repayment.

**Our likely response:**

- Provider moves to stage 5 of the operating model: Regulatory action & engagement.
- CQC requests the provider risk assessment meeting to understand the reasons behind the decline in performance.
- Quality inspections and supporting action plans are reviewed. Additional inspections may be arranged to check on progress.
- Stakeholder engagement: with the consent of the provider, CQC speak to the shareholders to confirm their support with the loan repayment.
- Assuming shareholder support is confirmed, the Business returns to regular monitoring with further risk analysis performed each quarter to monitor trading trends.

### Scenario 3

- Quality indicators are showing no signs of improvement.
- EBITDAR (i.e. profitability) has continued to deteriorate and EBITDA Leverage is now greater than 8x.
- Cash Flow Cover is less than 1x and the business appears unable to service the loan repayment profile.
- Lending Covenants are in breach but a Reservation of Rights letter has been issued and an Independent Business Review has been requested by the lenders.
- Management are unable to provide clarity on the position of the shareholders.

**Our likely response:**

- Reaches stage 5 of the operating model: Regulatory action & engagement.
- Stakeholder engagement 1: with Provider permission, the CQC speak to the shareholders to ascertain their support.
- Stakeholder engagement 2: with Provider permission, the CQC speaks to the Lenders to ascertain their likely course of action following the covenant breach.
- Independent Business Review (IBR): CQC considers appointing its own advisors to review the IBR and to maintain close links throughout the restructuring process.
- Business remains at stage 5 until restructuring negotiations are concluded.

### Scenario 4

- The IBR has identified concerns over the sustainability of the business as costs savings are lower than expected and quality issues have resulted in lower sales.

- Management have prepared a Turnaround Plan but this requires the Lenders to agree to a debt write-off and a cash injection from shareholders.
- Quality inspections are showing improvement in response to the Turnaround Plan but financial sustainability concerns remain due to the level of debt.
- Lenders have stated they are looking at all their options, including contingency planning.

**Our likely response:**

- ➢ Remains at stage 5 of the operating model: Regulatory action & engagement.
- ➢ Stakeholder engagement: level of CQC engagement with lenders and shareholders increases. Close links are maintained throughout the restructuring negotiations.
- ➢ Risk mitigation plan: CQC requests a risk mitigation plan to understand the likely outcome of the restructuring negotiations and whether this could involve an insolvency process. Advisor support may be required as experience of these situations will be critical to make this judgement.

### Scenario 5

- Restructuring negotiations are progressing with three potential outcomes:
    1. Lenders and Shareholders support the Turnaround Plan and agree to write off debt and inject cash respectively;
    2. Administrator is appointed and the whole business is sold immediately with no impact on operational performance;
    3. Administrator is appointed and part of the business is sold immediately, with remaining business wound down and closed.
- The negotiations are fluid and the potential outcome is difficult to predict.

**Our likely response:**

- ➢ Using feedback from lenders and shareholders, we will make a judgement on the likelihood of the appointment of an Administrator and make a decision on notification to LAs. The timing will vary depending on the assurances that can be provided.
- ➢ We will speak with the proposed Administrator and understand the impact of the Administration strategy on the continued provision of regulated services.
- ➢ On the basis of this, we will consider if the three conditions for notification have been met. If they have, then we will inform local authorities.
- ➢ If not, the provider remains at stage 5 and we continue to work closely with them and their stakeholders.

# Appendix F: Equalities Impact Assessment

This section sets out how we have complied with equalities guidelines in designing the Market Oversight model.

Our approach to this work has been shaped by the responses to the Department of Health's consultation on the proposed market oversight legislation. In addition, we have worked in co-production with a range of stakeholders, sector groups and CQC staff to help design the model and how it will operate.

The first Government consultation took place on 1st December 2012, when it launched a consultation on a number of proposals to improve market oversight in adult social care. The public's response identified a number of themes:

- Universal support for clarification of local authorities' roles in local oversight and involvement so that all people in all forms of regulated care should be covered.
- Support for the principle of targeted national/regional oversight of 'difficult to replace' providers.
- Oversight should avoid being over burdensome on providers and focus on a set of key performance indicators similar to those used by lenders.
- Oversight should help prevent business failure but not prop up failing businesses.
- Mixed support for CQC to have greater powers to enforce compliance or to build the oversight regime around our current enforcement powers.
- People wanted a system that involved and informed them about business failure.

We have engaged with the providers, lenders and service user support groups about our new approach. For example, we:

- Publicised the new market oversight duty on our website inviting the public to comment via our enquiries email address and online form.
- Extended an invitation to providers and professionals to be involved in our online community forum.
- Hosted four co-production events to involve stakeholders in the development of our market oversight operating model.
- Commissioned Oxford Brookes University to examine market stability within adult social care, and its relationship with the forthcoming market oversight regime, to help develop our thinking and to canvas external views about the regime. Care providers, regulators, charity groups and lenders were involved in the development of the report.
- Carried out social media activity to promote the signposting document

- Convened an external market oversight working group with representatives from care providers, regulators and other stakeholder groups to help advise on our market oversight preparations and the design of the operating model.

In developing this guidance for the adult social care Market Oversight scheme, we have reviewed the Department of Health's Market Oversight in Adult Social Care Impact Assessment which includes an equality analysis. The analysis did not identify any negative consequences and instead noted that the Market Oversight proposals would benefit groups sharing protected characteristics for two reasons:

1. Market oversight would provide users of social care services, families and carers with greater peace of mind and improve their experience of the social care system
2. Establishing contingency plans will create an opportunity for the local authority and provider to consider at an early stage the effects of failure and impact on continuity of care which will help lead to improvements for users even if provider failure doesn't happen.

Our co-production approach helped us develop an operating model which includes a risk escalation framework and takes into account human rights principles of equality and inclusiveness.

Several of the proposals are likely to have positive implications for human rights. In particular, market oversight will ensure that all users of adult social care services will be protected from the failure of difficult to replace providers regardless of whether users are publicly funded or self-funding. Service providers and their stakeholders will also be encouraged to discuss how services could be improved to ensure that the business remains sustainable and where there is failure, how this can best be dealt with.