# Application for Merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester Foundation Trust

## Purpose of Report:

- Information to note
- Support
- Resolution
- Ratify

## Consideration of Risk against Key Priorities

Completion of the proposed merger is required to realise the benefits described in the Manchester Single Hospital Service Programme.

## Recommendations

The Board of Directors is recommended to endorse the proposed Resolution, such that the Application for Merger with the University Hospital of South Manchester NHS Foundation Trust is made.

## Contact

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1. Introduction

This paper sets out the formal, statutory process for the Boards of both CMFT and UHSM to agree to apply for the Trusts’ merger.

The Boards of both Trusts will be asked to approve the following documents:

- Letter of application to NHS Improvement, appending draft Grant of Merger and draft Dissolution and Transfer Order;
- Draft constitution of MFT;
- Final risk register;
- Merger Agreement (with the documents referred to above appended); and
- Letter of representation to NHS Improvement.

The Boards will each be asked to delegate authority for signing the letter of application, the merger agreement and the letter of representation to their respective Chair and Chief Executive.

2. Background

The Merger Agreement is the principal legal document between the University Hospital of South Manchester NHS Foundation Trust (UHSM) and Central Manchester University Hospitals NHS Foundation Trust (CMFT) that allows the joint application for merger to be made.

The relationship between UHSM and CMFT in respect of the proposed merger has been governed by the Heads of Terms document since it was agreed in July 2017. The Heads of Terms confirmed the intention of the two Trusts to enter into the Merger Agreement, and set out the intended content of the Merger Agreement. The Heads of Terms had limited legal force: in contrast, the Merger Agreement is a legally binding document.

The Merger Agreement comes into force when it is signed on behalf of both Trusts (ie following the UHSM Board meeting on 14 September). The document confirms the planned date for completion of the merger as 1 October 2017. As UHSM and CMFT are the only two parties to the Merger Agreement, its legal force ends when the merger is completed.

The most important function of the Merger Agreement is to empower the Chairs and Chief Executives of the two Trusts to make the Application for Merger to NHS Improvement, and the Schedules include the application letter and relevant associated documents.

The Merger Agreement includes warranties and undertakings from the two Trusts in respect of how they have described existing risks, and also describes how the Trusts will behave and work together in the period prior to completion, including the actions that need to be taken to complete the merger, and the way in which they will conduct their normal business.

The Merger Agreement, the Letter of Application, the draft Grant of Merger and the draft Dissolution and Transfer Order have been developed between the Trusts, with specialist advice from the SHS programme legal advisers (Hempsons), and close liaison with the legal team at NHS Improvement. Care has been taken to ensure consistency between these documents in their wording.
The draft Constitution has also been developed with appropriate specialist legal advice, and is a separate item on the Board agenda. This document has already been approved by the Interim Board.

The Final Risk Register is a combined document that has been developed between the two Trusts, taking account of existing items on the two corporate risk registers, and risk issues that have been identified through the merger process. It has been updated immediately prior to the issuing of the Board papers, and identifies all risks with a rating of 15 or over. This document has already been approved by the Interim Board.

The management Letter of Representation is an undertaking from the Boards that they have been open and transparent in their dealings with NHS I throughout the Transaction review process. It has a standard format prescribed by NHS I.

All of this documentation is required under the NHS Improvement (Monitor) Transaction Guidance (Supporting NHS Providers: guidance on transactions for NHS Foundation Trusts), and all of it needs to be approved by the Boards of the two merging parties to ensure that the merger can progress effectively.

3. Statutory approvals process

The Board has received comprehensive documentation to support the decision to proceed with the proposed merger. The Board papers on this agenda include the Merger Agreement and the related documents that constitute the Schedules to the Merger Agreement. The approval of the Merger Agreement and associated documents is the action that allows the application for merger to be made.

The requirements for the application for merger are set out in section 56 of the National Health Service Act 2006 (NHSA):

“The application must… specify the property and liabilities proposed to be transferred to the new NHS foundation trust…and…be accompanied by a copy of the proposed constitution of the new trust”.

The property and liabilities to be transferred are specified in the Merger Agreement which defines “Transferring Properties and Liabilities” as:

all the property and liabilities of the Parties including, without limitation:

(a) the obligation to prepare any outstanding accounts of the Parties and to perform all statutory duties relating to those accounts;
(b) the outstanding public dividend capital of the Parties, any loans or grants made to them and any other payment obligation;
(c) any criminal liabilities of the Parties; and
(d) all of the trust property of the Parties

but excluding any rights and liabilities under, or in connection with, a contract of employment which transferred to MFT on the transfer date under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

This drafting is consistent with the provisions of the draft Dissolution and Transfer Order, which is the statutory instrument that gives effect to the transfer.

4. Recommendations

The CMFT Board of Directors is invited to support the following resolution:

RESOLUTION

1.1 In this Resolution the following words and phrases shall have the following meanings:
(a) “Application for Merger” means the application to be made jointly by the Trusts to NHS Improvement in accordance with section 56 of the NHS Act for the dissolution of the Trusts and the establishment of a new NHS foundation trust, in the form set out in the letter of application; and

(b) “NHS Act” the National Health Service Act 2006 (as amended by the Health and Social Care Act 2012);

1.2 the Board, resolves: “To approve the Final Risk Register included as [Agenda Item 8.1.5], which will be included as Schedule 5 to the Merger Agreement.”

1.3 the Board, resolves: “To approve the final draft Constitution for Manchester University NHS Foundation Trust and to submit this to Monitor pursuant to section 56(2)(d) of the NHS Act.”

1.4 the Board, resolves: “To approve the letter of application in the form set out in [Agenda Item 8.1.1]”

1.5 the Board, resolves: “To make, pursuant to section 56(1) of the NHS Act and under the Trust’s constitution, the Application for Merger and delegates authority to the Chairman and the Chief Executive to sign the letter of application on behalf of the Trust.”

1.6 the Board, resolves: “To enter into the Merger Agreement with the University Hospital of South Manchester NHS Foundation Trust and delegates authority to the Chairman and the Chief Executive to sign the Merger Agreement on behalf of the Trust.”

1.7 the Board, resolves: “To approve the letter of representation to NHS Improvement in the form set out in [Agenda Item 8.1.7] and delegates authority to the Chairman and the Chief Executive to sign the letter of representation on behalf of the Board.”