

30. NATIONAL HEALTH SERVICE INCOME GENERATION – BEST PRACTICE

REVISED GUIDANCE ON INCOME GENERATION IN THE NHS

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CHAPTER ONE: INTRODUCTION

- 30.1 This guidance gives information and advice about Income Generation in the NHS. It updates the 2001 guidance, which itself replaced the 1989 guidance “Income Generation: a Guide to Local Initiative”.
- 30.2 The guidance is applicable to NHS bodies, a term used throughout this guidance and which includes all NHS trusts (including Ambulance Trusts and Mental Health Trusts), Primary Care Trusts (PCTs) and Strategic Health Authorities (SHAs). From 1 April 2005 all Special Health Authorities (SpHAs) were given income generating powers – see Annex A. See paragraph 30.6, below, for information on Foundation Trusts (FTs).
- 30.3 Income generation powers enable NHS bodies (abiding by specific rules) to raise additional income from marketing any spare capacity resulting from a non-core function, or from exploiting intellectual property rights, to raise additional income for health services.
- 30.4 There are a large number and wide variety of well-established income generation schemes currently operating. However, one of the aims of this guidance is to prompt NHS bodies to take stock of their Income Generation activity and consider whether there is any potential to develop this further.
- 30.5 The Government has set out a policy which aims to encourage government departments, agencies and Non Departmental Public Bodies to make better use of their assets by engaging in commercial services based on them. This policy is set out in the HM Treasury document “Selling into Wider Markets: A Policy Note for Public Bodies” issued in December 2002. This income generation guidance should be read in conjunction with that document. It can be accessed on HM Treasury's web-site at http://www.hm-treasury.gov.uk/media/ED8AB/New_WM_guidance.pdf or can be obtained from the Treasury Public Enquiries, telephone 020 7270 4860/4870/4880.

Foundation Trusts

- 30.6 Section 14(3) of the Health and Social Care (Community Health Standards) Act 2003 gives Foundation Trusts the power to make additional income available in order to carry on its principal purpose better. The Secretary of State has no powers of direction over Foundation Trusts. Therefore, this guidance does not apply to them since they are not bound by the rules on income generation outlined below. Foundation Trusts are subject to corporation tax on their non-core healthcare commercial activities. Information on this is at: <http://www.hmrc.gov.uk/specialist/ct-nhs-guidance.pdf>

CHAPTER TWO: DEFINING INCOME GENERATION

The Legislation

- 30.7 Income generation schemes are those that rely on Section 7(1) to 7(8) of the Health and Medicines Act 1988 for their legitimacy (see Annex B). These powers are extended to trusts by virtue of Schedule 2 paragraph 15 of the NHS and Community Care Act 1990 (also at Annex B).
- 30.8 The Health and Social Care Act 2001 inserted new subsections (7A) and (7B), which give NHS bodies that have income generation powers additional powers to form trading companies.
- 30.9 It is important to note that activities that generate additional income but which are covered by separate legislation do **not** fall under the umbrella of income generation schemes. A list of activities covered by separate legislation can be found at Annex C.

What is an Income Generation Scheme?

- 30.10 For a scheme to be classed as an Income Generation scheme, the following conditions need to be met:
- the scheme **must** be profitable and provide a level of income that exceeds total costs. If the scheme ran at a loss it would mean that commercial activities were being subsidised from NHS funds, thereby diverting funds away from NHS patient care. However, each case will need to be assessed individually. For example, if a scheme is making a substantial loss then it should be stopped immediately. On the other hand, if the losses are small and can be attributed to initial start up costs and there is a strong indication that the scheme will generate a profit within a reasonable time then it may be acceptable to continue running the scheme. However, the scheme would need to be closely monitored with a set deadline for it to become profitable. As initial start up costs would usually be incurred in the first six months, NHS bodies should use this time limit as a deadline for recouping these costs. In any event we recommend that NHS bodies seek advice from their auditors when assessing these cases. There are other exceptional circumstances where it may be sensible for a scheme to break even, for example, if land or property cannot be sold then it may be rented out in order to recover the best possible income;
 - the profit made from the scheme, which the NHS body would keep, **must** be used for improving the health services;
 - the goods or services **must** be marketed outside the NHS. Those being provided for statutory or public policy reasons are **not** income generation.

Under What Circumstances Should Income Generation Powers Not Be Used?

30.11 When setting up an income generation scheme the protection of NHS core objectives is paramount and NHS bodies must ensure the following:-

- Income generation schemes **must not** in any way interfere with the provision of NHS services to patients. NHS bodies will need to ensure that they can meet any commitments to schemes which may be of a long-term nature, without diverting significant management resources or otherwise prejudicing delivery of core objectives. Careful account should be taken of the risk that anticipated income will not materialise, and of the need to avoid diverting resources from core objectives to make good shortfalls in income. It is reasonable, and will in many cases be necessary, for NHS bodies to make some investment in setting schemes up but the balance between sensible investment and risk must be considered;
- Income generation schemes **must not** become so large that they move from trading on the margins of core business to become significant trading businesses which provide a vital level of income to the NHS body which it becomes reliant on to carry out its core NHS functions. (See paragraph 30.64 on Significant Trading Businesses and paragraph 30.82 on consulting HM Treasury);
- Income generation powers **must not** be used to carry out the delivery of core functions;
- NHS bodies **must not** use income generating powers to delegate the delivery of their core functions to some other body, for example, a subsidiary trading company. Core functions must be carried out by the NHS body to whom they have been delegated by the Secretary of State by an Order, Regulations or Directions, unless they are also given authority to re-delegate. Not to do so would be acting *ultra vires*;
- NHS bodies should take account of the risks that may arise from certain schemes and that these risks could well outweigh any potential income. For example an NHS body may service oxygen bottles for a local diving club for a small charge. A faulty valve could result in serious harm to an individual with the resulting liability lying with the NHS body involved. A commercial insurer would probably be alert to any scheme that has the potential to be damaging in this way, however this issue must be given serious consideration for all schemes.

Income Generation or Service Provision?

30.12 It can be difficult to decide if some activities are income generating or simply part and parcel of service provision. For example it is probable that many

NHS bodies provided staff canteens, accommodation and nurseries long before income generation powers were introduced by the Health and Medicines Act 1988. In these cases the Trust Board should decide whether each particular service will be run as service provision or income generation. If a particular facility is run as service provision then the income generation rules on generating profit will not apply.

Taking Stock of Income Generation

- 30.13 When considering areas where there is a potential to generate income, the main points to consider are:
- are the assets (and goods and services already or potentially derived from them) unique or of sufficiently high quality that they have the potential to generate successful commercial spin-offs? Or,
 - is there spare capacity, after delivering the NHS body's core objectives, which could be used for commercial purposes.
- 30.14 As part of this exercise, NHS bodies should be aware that if spare capacity relating to land and buildings is identified then, in addition to income generation, they should consider whether a disposal of an asset would be a more beneficial option.

Personnel Issues

- 30.15 Many schemes for income generation will affect staff either in their work capacity or as users of the arrangement proposed. NHS bodies should ensure appropriate and timely consultation takes place and that this, wherever possible, includes advice on the specific use intended for profit generated to improve health care locally. Managers will wish to consider how best, within the regulations, to reward staff who participate by identifying income generation opportunities or by providing services additional to their contracted responsibilities.

Trading with Other NHS Bodies

- 30.16 Many NHS bodies provide goods or services to other NHS bodies for a charge, and sometimes make a profit from this activity. This income should not be regarded as income generation because the purpose of the powers given to the NHS are to generate additional income which comes from **outside** the NHS. However, these arrangements are to be encouraged if they improve cost effectiveness. The provision of estates and facilities services by one NHS trust, for example, could reduce costs for participating NHS trusts because of the scale of the operation.

CHAPTER THREE: EXAMPLES OF INCOME GENERATION SCHEMES

- 30.17 There are separate guidance booklets specifically on implementing some of the most common types of income generation schemes – *Car Parking Charges; Occupational Health; Catering Services* and *Retail Outlets*. These were published in 1996 and so are currently being updated. They will be published on the web in due course.
- 30.18 This chapter discusses some of the most common areas where queries arise on income generation. It is not a comprehensive list of income generation schemes operating in the NHS.

Amenity Beds

- 30.19 Income generation powers allow NHS bodies to provide patients with a separate room with extra facilities such as a television and telephone. The person is still an NHS patient but has chosen to pay for these additional facilities.

Charges for Certain Patient Services

- 30.20 If an item or service is considered to be an integral part of a patient's treatment by their clinician then a charge should not be made. However NHS bodies can charge for certain patient services that are considered to be additional treatments over and above the normal service provision. There is no blanket policy to cover this and each case should be considered in the light of the patient's clinical need.

Financial Services

- 30.21 Some NHS bodies have tried to generate income in the forms of commission for selling financial services to employees and advertising revenue from financial firms. Before entering into such arrangements you should be aware of the stringent and complex regulations governing financial services.
- 30.22 The Financial Services and Markets Act 2000 (FSMA) introduced a new United Kingdom regulatory regime in the banking and financial services sphere. A single statutory body, the Financial Services Authority (FSA), regulates all functions carried out in the financial services sector.
- 30.23 If income is generated from for example, fees for displaying posters or commission from displaying leaflets, you do not require authorisation. However, you may want to ensure that the promoter or advertiser has the required authorisation and or regulation.

- 30.24 If, for example, you collect subscriptions from employees via payroll for the services provided by the promoter or take a more active role in providing financial services to employees you might require FSA authorisation yourself depending on the level of your involvement in the transaction. If you need authorisation but don't get it, you are committing a criminal offence.
- 30.25 For advice generally, consult your own advisers, the FSA website www.fsa.gov.uk or seek guidance regarding the particular activity from the FSA Perimeter Guidance Manual team (PERG team) on 0207 066 0082.

Hearing Aids

- 30.26 NHS hearing aids are provided as an NHS service for which there is no charge. However some patients may opt to purchase an alternative hearing aid that is not part of the NHS range and some NHS bodies have established separate arrangements to sell hearing aids. NHS hospitals involved in the private sale of hearing aids must register both the trust and the dispenser with the Hearing Aid Council. The Hearing Aid Council can be approached for advice in its role in consumer protection (<http://www.thehearingaidcouncil.org.uk/>).
- 30.27 **The NHS must ensure that there is a very clear demarcation between NHS services provided free at the point of delivery and hearing aid dispensing that is a commercial activity.**

Intellectual Property and the Use of Companies

- 30.28 The commercialisation of intellectual property by NHS bodies falls within the scope of their income generation powers. A Framework and Guidance has been published by the Department of Health for NHS trusts and Primary Care Trusts on how they should develop and exploit innovations and manage the associated intellectual property in order to make more income available for improving the health service. This Guidance was published in 2002 and is entitled "The NHS as an Innovative Organisation: A Framework and Guidance on the Management of Intellectual Property in the NHS". A link to the document can be found on: http://www.innovations.nhs.uk/nhs_ip_guidance.htm. The Framework and Guidance includes descriptions of a management framework, guidance on ownership of intellectual property, employment issues and a legal framework.
- 30.29 The Department of Health has established a network of nine management organisations (NHS Innovations Hubs) to assist NHS trusts and Primary Care Trusts in the management of intellectual property generated by their employees. Each NHS Innovations Hub is available to serve all NHS organisations in the geographical regions of the nine English Regional Development Agencies.

- 30.30 Section 7(7A) of the Health and Medicines Act 1988 (inserted by the Health and Social Care Act 2001) enables the Secretary of State to form or participate in the formation of companies and to invest in companies for income generation purposes, and the Secretary of State can delegate this power to NHS trusts and Primary Care Trusts. In particular this enables them to participate fully in spin-out companies established to exploit intellectual property. The right to set up companies is not restricted to spin-out companies and commercialisation of intellectual property. Companies could also be established, for example, to provide specialist services if this provision does not interfere with the core health service duties of NHS trusts and Primary Care Trusts.
- 30.31 NHS trusts and Primary Care Trusts that wish to establish companies, but excluding Foundation Trusts, are required to submit a business case for approval by the Commercial Directorate of the Department of Health on behalf of the Secretary of State. Business cases are best channelled through Hub organisations who will forward the business case to the Commercial Directorate.
- 30.32 3-star Trusts which have had one business case for such a company approved by the Commercial Directorate (or, before these new arrangements, by the Private Finance Unit) can participate in further activity without express approval by the Commercial Directorate. 3-star Trusts who no longer need approval by the Commercial Directorate are advised to send a business case to the Commercial Directorate to make them aware of the proposed new activity. Foundation Trusts may also send proposals to the Commercial Directorate for comment.
- 30.33 The Framework and Guidance published in 2002 was written initially for NHS trusts and Primary Care Trusts. On 1 April 2005 all Special Health Authorities were given income generation powers including the use of companies, through the issue of Directions (www.innovations.nhs.uk/nhs_ip_guidance/use-of-companies.htm). They revoke any existing income generation powers and so all Special Health Authorities will operate under the same Directions.
- 30.34 These Directions for Special Health Authorities are closely modelled on those issued to NHS trusts and Primary Care Trusts and they set out procedures to be followed whenever a Special Health Authority wishes to set up a company. They also require that a business case is approved by the Commercial Directorate (in the case of cross-border Special Health Authorities with the agreement of the Welsh Assembly). Special Health Authorities may also wish to channel their business cases through the Hub organisations.
- 30.35 Under the Directions NHS trusts, Primary Care Trusts and Special Health Authorities are required to submit to the Commercial Directorate by September 30 each year an annual report on income generation activities that use companies. This annual report, which should be sent to Maire.Smith@dh.gsi.gov.uk, should include published accounts and reports of activity for all companies set up under the Act and should include changes to

the Memorandum or Articles of Association of the companies. The Commercial Directorate will collect this information and prepare a consolidated annual report for the Secretary of State and submission to Parliament.

- 30.36 A guidance document, 'The Use of Companies in Income Generation in the NHS', that is intended as a reference and signposting publication for NHS trusts, Primary Care Trusts and Special Health Authorities is on www.innovations.nhs.uk/nhs_ip_guidance/use-of-companies.htm. It gives the main elements of the Framework and Guidance, a background to the Hubs and a summary of the procedures to be followed in preparing a business case for approval by the Commercial Directorate.

Land and Property Development

- 30.37 *Estatecode: Essential Guidance on Estates and Facilities Management, 2003* (due to be updated in 2006) is the Department's guidance document on the management of land and property transactions and estate management, which should be followed by all NHS organisations. This includes guidance on NHS bodies' current and future requirements in respect of their land and buildings. As part of this exercise they are able to identify surplus capacity and whether it should be used for either disposal or income generation. Appendix VII provides some guidance on the Income Generation powers permitted by Section 7 of the Health & Medicines Act 1988 and Section 5(9) of the National Health Service & Community Care Act 1990. The 1999 Health Act increased the scope for income generation.
- 30.38 There are many examples of profit sharing arrangements between the NHS and the private sector. The construction and letting of concourse shops by the entrance to hospitals, leasing of mobile phone aerials, and the letting of hoarding boards are just a few examples which provides an opportunity to secure income from the use of the estate, for the benefit of NHS services. These are discussed in Section 5 of *Estatecode*. There are many other forms of joint venture, for example car parks, incineration & waste, transport, nursery facilities etc., which can be undertaken.
- 30.39 Where posters or other advertising within hospital or other premises is permitted as an income generation activity, then it is especially important that a clear policy about suitable texts, pictures, and content should be established. NHS bodies should not consider advertising personal injury or claims management services, nor other politically sensitive or controversial areas, or health risk products such as tobacco or alcohol. This is specifically set out in an addendum to *Estatecode* in 2004, found at: <http://www.dh.gov.uk/assetRoot/04/11/99/09/04119909.pdf>
- 30.40 Care needs to be taken before entering into agreements with the private sector, and full professional advice sought. Further care needs to be taken to ensure that any future hospital building works, or possible disposals, are not affected or delayed by any income generation initiative.

- 30.41 An electronic copy of *Estatecode* can be found at www.dh.gov.uk/PolicyAndGuidance/OrganisationPolicy/EstatesAndFacilitiesManagement/EstatesAndFacilitiesArticle/fs/en?CONTENT_ID=4118956&chk=gz0VFG then click onto the link to Knowledge and Information Portal. Alternatively, call DH Estates & Facilities on 0113 254 6629 for further guidance.

NHS Plus

- 30.42 NHS plus is an initiative which was introduced to make NHS occupational health services available to employers who can buy, either in whole or in part, occupational health services to improve the health of their employees. These services build upon those provided locally by hospitals and Primary Care Trusts. The profits made from this scheme will be reinvested in the expansion and improvement of NHS services. It is suggested that the best use of the profits generated from income generating occupational health services would be to re-invest them back into NHS occupational health services to improve them. Safeguards will be in place to ensure that NHS Plus does not interfere with the delivery of occupational health services to NHS staff and patients. Further advice and information on the policy surrounding NHS Plus can be found on the website www.nhsplus.nhs.uk or on freephone number 0800 092 0062. NHS bodies should check the website when considering NHS Plus in relation to Income Generation activity to keep abreast of developments.

Occupational Therapy Activities

- 30.43 Occupational therapy activities carried out by mental health patients which make an income can be classed as income generation schemes provided a profit is made after any appropriate payment of wages to the patients.

Patient Transport Services

- 30.44 The Department of Health issued guidance on 'Ambulance and Other Patient Transport Services: Operation, Use and Performance Standards' (HSG (91) 29). In respect of non-emergency patient transport services, the guidance states - 'Medical need for non-emergency patient transport must be determined by a doctor, dentist or midwife and will depend on the medical condition of the individual patient, the availability of private or public transport and distance to be travelled. The principle which should apply is that each patient should be able to reach hospital in a reasonable time and in reasonable comfort and without detriment to their medical condition.'
- 30.45 However, income generation powers can be used to charge patients for the provision of transport for 'social', rather than 'medical' needs.

30.46 Primary Care Trusts (PCTs) are responsible for providing or securing the provision of ambulance services (which could include patient transport services) to such extent as they consider necessary to meet all reasonable requirements. It is for the PCT to decide who receives patient transport services in their area. PCTs should therefore apply the principles outlined in HSG (91) 29 either to consider each case on its merits or to develop local criteria for the use of patient transport services.

Research and Development (R&D)

30.47 The Prime Minister's Pharmaceutical Industry Competitiveness Task Force (PICTF, March 2001) reported an inconsistent approach to costing for commercial R&D activity in the NHS. The Department agreed to clarify guidance to promote a more consistent and transparent approach to pricing.

30.48 The current policy for commercial R&D in the NHS is in two guidance documents:

- HSG (97) 32 Responsibilities for meeting patient care costs associated with research and development in the NHS),

http://www.dh.gov.uk/PublicationsAndStatistics/LettersAndCirculars/HealthServiceGuidelines/HealthServiceGuidelinesArticle/fs/en?CONTENT_ID=4018353&chk=ZUXc1q and

- Commercial sponsorship: ethical standards for the NHS, November 2000) http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4005135&chk=2dVITD.

30.49 This section supplements that guidance and should be read in conjunction with it. All NHS income derived from commercial R&D activity is raised through Income Generation powers. NHS bodies engaged in this activity should make arrangements to ensure they comply fully with this guidance, including the accounting requirements. The guidance requires income generation activity to be profit making but does not specify target levels.

30.50 The Department has assured the pharmaceutical industry that it wishes to support and encourage R&D in the NHS. The creation of UK Clinical Research Collaboration in 2004 is one of the measures introduced to facilitate this. The NHS should not subsidise commercial R&D. That would divert resources from patient care. On the other hand, the Government does not wish the NHS to take advantage of market conditions to maximize profits, because of the wider benefits of conducting R&D activity to NHS patients in this country.

30.51 Paragraph 30.20 states that where an item or service is considered an integral part of a patient's treatment (treatment in this context includes diagnostic procedures) then a charge should not be made. Income generation powers must not be used to carry out the delivery of core functions. Therefore, when

costing out commercial studies, NHS bodies may not seek to recover from industry the costs of standard treatment that would otherwise have been incurred in treating patients in the NHS. NHS bodies' costing may include only activities, tests, treatments, etc which are in addition to normal treatment of the condition concerned. The exception is that, in accordance with the normal conventions for commercial clinical trials, the company sponsoring the trial is expected to supply free the medicine that is the subject of the trial.

- 30.52 In discussions on pricing with companies proposing to undertake commercial studies, NHS bodies should seek to disaggregate costs, with appropriate overheads related to each separately identified item, to avoid the use of general overheads. This approach is in line with Government policy to improve transparent pricing in selling government services into wider markets. Guidance is provided in the document "Guidance to Facilitate the Conduct of Commercially Funded Research in the National Health Service (Secondary Care)", January 2005, produced by the NHS Research and Development Forum, ABPI and the Institute of Clinical Research (www.rdforum.nhs.uk).
- 30.53 NHS bodies should consider in the context of all their functions how they propose to utilise funds generated through commercial R&D activity. It is acceptable to plan for profit to be used within the NHS body's own managed R&D programme, but this is a matter for agreement with the NHS body's Board and Chief Executive.
- 30.54 Guidance on contract research and on collaborative or co-funded research related activity is given in the Clinical Research Report of the Pharmaceutical Industry Competitive Task Force which was published in March 2002 (www.advisorybodies.doh.gov.uk/pictf).

Telephone Services

- 30.55 The NHS Plan set out that bedside and telephone and entertainment services would be available in all major hospitals. The Patientpower initiative means that private suppliers can install these bedside services as a single unit. This is done through a national licence. A supplier enters into a model concession agreement with the NHS trust. This service is provided at nil cost to the NHS trust, therefore it is **not** an income generation scheme.

Training Courses

- 30.56 Postgraduate deans are able to use income from accrediting training courses to fund further educational initiatives and this is classed as income generation.

CHAPTER FOUR: DEVELOPING AN INCOME GENERATION SCHEME

Developing a Business Case

- 30.57 The first step in the process of considering the potential of an income generation scheme is the development of a business case. This must include:
- the potential income of each individual project weighed against its costs and how it will be priced and managed;
 - a cash flow projection over 5 years (or the expected duration of the activity);
 - a sensitivity analysis on the financial forecasts to demonstrate the scheme is robust;
 - a risk assessment, of which the level of detail required will vary considerably depending on the size, complexity and degree of risk involved in the proposed project. NHS bodies should consider carefully the nature and duration of the commitment they enter into, assessing the potential risks and benefits and any potential liabilities should it, or its private sector partner wish to withdraw from the arrangement. NHS bodies should also identify potential areas of risk and environmental impacts that might result from this venture, and ensure compliance with the NHS controls assurance risk management process.
- 30.58 All business cases will need to be reviewed and approved at Board level.
- 30.59 Partnerships UK (see below) can provide more information on developing a business case.
- 30.60 Memorandum Trading Accounts (MTAs) must be maintained for all schemes with an annual turnover of £50k or more and as well as being available on demand for auditors, must be sent to SHAs with NHS trusts' annual accounts (see Chapter 5 on accounting and monitoring).

Pricing, Costs and Returns

- 30.61 The pricing and costing of schemes is discussed more fully in the HM Treasury publication "The Fees and Charges Guide" which can be obtained from The Stationery Office (TSO). This is complemented by the HM Treasury Guidance *Selling into Wider Markets: A Policy Note for Public Bodies (2002)* – see paragraph 30.5 for web link. Both publications make it clear that pricing must be fair and that it must at least recover full costs, including overheads, depreciation of assets and an appropriate return on capital employed. For commercial services where there is no competition and no realistic prospect of competition from the private sector, the average real terms return on capital is also 3.5%, as it is for statutory and inter- or

intra-Departmental services. For commercial services where there is or may be competition from the private sector, the required rate of return will be based on a departmental assessment, but expected to fall within a range of 5.5% - 15% in real terms, depending on factors such as the level of risk. In practice, the upper end of the range will rarely be used, as it is unusual for public sector bodies to engage in such high-risk activities. See Annex D for worked example.

30.62 NHS bodies should seek advice from in-house or private sources who have appropriate experience on what should constitute a suitable commercial charge. In general, a commercial fee or charge should give due weight to the appropriate commercial forces, which will include:

- the various costs of the service provided;
- the potential scale of operation;
- consumer demand;
- the long term earning potential;
- the value of the assets involved;
- the charge for comparable services in the private sector; and
- the principles of fair trading and competition law.

Competition Policy

30.63 All commercial activities undertaken by the NHS should be priced fairly but competitively to maximise return without legitimate complaint from competitors. NHS bodies must ensure that there is a “level playing field” with the private sector in relation to pricing and competition. When developing business cases, NHS bodies need to consider whether they are subject to domestic and EC competition rules and if so act within those rules including observing the requirements of the Competition Act 1998, and the existing provisions of the Competition Act 1980 and the Fair Trading Act 1973 as appropriate. NHS bodies should take their own legal advice as appropriate and if there are competition concerns in respect of their commercial activities they should consult DTI at the DTI’s Competition Policy legal team on 0207 215 3426.

Significant Trading Businesses

30.64 Previous guidance (issued to Regional Health Authorities in 1994) outlines that, if a scheme moves from trading on the margins of core business to significant trading providing a vital level of income to the parent body then it

should be disposed of. Those that develop to the point of independence are usually sold to the private sector. NHS bodies should also consider the option of forming a Public Private Partnership (PPP) for such income generation activities if the body has an ongoing interest in the activity. A PPP can offer better value by allowing the body to share in the long term value of the activity, while limiting the risks to the NHS body and ensuring it does not distract from core activities. In cases of selling to a private sector buyer or forming a PPP, NHS bodies must undertake an accurate and up-to-date valuation of their business or asset before it is sold to ensure that the full value of the business is realised and to enable them to be well prepared to conduct negotiations with bidders.

Public-Private Partnerships

- 30.65 In many cases NHS bodies will be engaged in relatively simple and probably small schemes, for example letting out spare capacity in a building. In these cases it is likely that the NHS body will undertake the activity on its own or with the help of an agent. In other cases, NHS bodies may enter an arrangement with a private sector firm to sell an existing good or service to third parties. This might be the most appropriate structure for the commercialisation of things like car parking, staff accommodation or catering services. Again the commercial structure involved is likely to be relatively simple, for instance through a licensing agreement.
- 30.66 However, in some cases, further development of a scheme may be required to enable a commercial return on it, for example if the NHS body does not have the necessary expertise and experience in areas such as product development and marketing. In such cases, or in any event where the selling of goods or services requires a free-standing new business, joint arrangements of some kind with the private sector would normally be appropriate.
- 30.67 The level of risk involved in a public-private partnership will vary project by project. Risks should be apportioned between the private and public sectors according to which party is best placed to manage them. In most cases the private sector will make its input through, for example, marketing and development. The NHS body's input will usually be its asset and any significant investment in a project should be undertaken by the private sector partner. The ownership and reward structure is likely to reflect the input and level of risk borne by each partner.
- 30.68 NHS bodies should ensure they have a fair return for the use of their assets and that they have in place adequate internal arrangements to monitor the progress of their interests in public-private partnerships and to liaise with private sector partners.

Partnerships UK (PUK)

30.69 NHS bodies can contact Partnerships UK if they are considering forming a Public Private Partnership as they can provide help, guidance and in-depth support for implementing Public-Private Partnerships. Partnerships UK has been tasked by HM Treasury to support public bodies implementing Wider Markets activity. A helpdesk (telephone 020 7273 8381 or e-mail helpdesk@partnershipsuk.org.uk) has been established, free at the point of use for public sector bodies, which can be consulted on any queries relating to the Wider Markets Initiative. The PUK website (<http://www.partnershipsuk.org.uk/BusinessSectors/commercialisation-sector.asp>) provides information, guidance and best practice on key issues for public sector bodies considering wider markets projects. PUK also has a dedicated team which can advise on commercialisation of public sector science and technology.

Contracts

30.70 Given the potential range of projects which NHS bodies might enter into with private sector companies, it is not possible to devise a single “model” contract. However, in preparing a contract locally, NHS bodies should take account of the points listed in Annex E of this guidance. This considers some of the key issues to be addressed when establishing Public Private Partnerships. NHS bodies should still seek professional advice locally in respect of projects requiring significant investment.

Tax

30.71 In general, services generating income and the sale of goods to the public or other organisations will be subject to VAT. However, there is a range of VAT reliefs, including occupational health services and some medical care or aids for disabled persons. For services and goods provided to other NHS bodies within the same VAT registration (ie all English SHAs, SpHAs, PCTs, NHS trusts and NHS FTs – except Moorfields Eye Hospital NHS Foundation Trust) VAT need not be charged. If in doubt, please contact the NHS Administration Team at Her Majesty’s Revenue & Customs on 020 8929 2695, or use the website: <http://www.hmrc.gov.uk/menus/contactus.shtml>

Insurance

30.72 Money from Income Generation schemes is intended to create revenue over and above that which arises in the normal course of providing NHS services. The general principle whereby the Crown bears its own losses is therefore inappropriate in these circumstances. This is because, as essentially a discretionary activity, it is unacceptable that any losses to which schemes give rise should be borne at the expense of the services for which Parliament has made resources available to the NHS. Ministers have therefore taken the view

that income generation activities should be entirely self-supporting and that appropriate commercial insurance should be taken out to offset any liabilities which may arise in the course of carrying them out.

- 30.73 This policy is reflected in the rules governing coverage of the Liabilities to Third Party (LTPS) scheme run by the NHS Litigation Authority, of which almost all NHS trusts and Primary Care Trusts are members. The LTPS is the risk pooling mechanism by which NHS provider organisations manage the liabilities, risks and losses arising from providing NHS services.
- 30.74 However, income generation activities which are run incidental to the delivery of NHS services (eg. sale of marginal spare capacity to produce goods or services required in the course of NHS business), or in line with the principle outlined at paragraph 30.16 above (ie. for the benefit of the NHS business of other NHS bodies) are normally covered by the LTPS, and no additional commercial insurance cover will be required. In cases of uncertainty about the status of individual schemes, the NHSLA will decide whether these qualify for cover under the LTPS.

CHAPTER FIVE: ACCOUNTING AND MONITORING

Using Memorandum Trading Accounts

- 30.75 Income generation in NHS bodies will be monitored by SHAs. The annual turnover level at which schemes must be accompanied by a Memorandum Trading Account (MTA) is £50k, although the maintenance of MTAs for smaller schemes is also recommended. Previous guidance advised that MTAs must be available on demand for audit purposes and this is still applicable, however we now also advise that MTAs must be sent to the SHA with NHS trusts' annual accounts. The minimum information required for MTAs is detailed in Annex F.
- 30.76 NHS trusts are advised that it is best practice to provide a full account of all schemes in the Operating and Financial Review section of their Annual Reports. This should include information about the scale of resources devoted to significant projects (or groups of projects which together are of a significant size), value for money and information about the efficient use of public sector assets and indicators of commercial performance. Those trusts with higher levels of income generation activity may wish to consider publishing a separate report of their commercial activity. Where financial systems cannot identify the full costs or particular activities, a reasonable apportionment of joint costs should be made and the justification for those figures should be kept for inspection by external auditors.

The Role of the Wider Markets Officer

- 30.77 NHS trusts are encouraged to nominate, in line with Treasury Guidance, an official as an internal Wider Markets Officer who will ensure, on behalf of the Finance Director, that schemes are operating within the law and that relevant guidance is being followed, particularly in relation to pricing and competition.

Responsibilities of the Wider Markets Officer

- 30.78 The Wider Markets Officer has three broad areas of responsibility. They are:
- to ensure compliance with the law and relevant guidance both at the project development stage and through periodic reviews;
 - to be a central base of experience and guidance, particularly in relation to pricing and competition issues;
 - to act as a point for reference for outside queries relating to the pricing of services to ensure consistency within all NHS bodies.

- 30.79 Wider Markets Officers should pass their contact details to Partnerships UK (telephone 020 7273 8381) in order to receive further guidance and updates on the Wider Markets initiative.
- 30.80 Some NHS bodies may decide to add the responsibilities of the Wider Markets Officer to those of their existing fees and charges co-ordinator. Where satisfactory alternative arrangements and fair trading criteria are in place, NHS bodies may wish to consider delegating responsibility for the clearance of more straightforward projects to the Directorate/Business Unit or other appropriate level.
- 30.81 The role of the Wider Markets Officer is intended to be supportive whilst ensuring rigour and coherence in the development of wider markets projects. Further information about the role of the Wider Markets Officer can be found in the Treasury Guidance: 'Selling into Wider Markets: A Policy Note for Public Bodies' 2002 (see paragraph 30.5 for web link) or the PUK website.

Consulting HM Treasury

- 30.82 Some schemes may require Treasury approval because they have the potential to affect the Government's overall spending plans and priorities, or they have the potential to be contentious or repercussive. At present, all schemes where the full annual cost, ie investment in the project, is in excess of £1 million require Treasury approval (although fees and charges thresholds are currently under review). In addition Treasury spending teams should be consulted where annual gross profit from all income generation schemes exceeds 5% of NHS trusts' annual income provision.

CHAPTER SIX: OTHER ISSUES

Charity

30.83 The income generation powers do not change the position of NHS bodies regarding the holding of and access to funds obtained from charitable sources. Charity trustees may be the body corporate, Special Trustees, Trustees for an NHS trust or outside the NHS – eg Hospital Leagues of Friends. The trustees operate under charity law and whenever possible should apply the funds in accordance with donor’s wishes. It is important that trustees of NHS charitable funds should account for those funds in a way that distinguishes properly between “restricted” and “unrestricted” funds as described in the charity Statement of Recommended Practice (SORP). Further information on trusteeship of NHS charities and trust funds can be found in the NHS Finance Manual (Download Version) (www.info.doh.gov.uk/doh/finman.nsf).

Fundraising

30.84 NHS bodies serving as corporate trustees have specific powers under NHS legislation to accept gifts for NHS wide purposes. Bodies of individual trustees appointed under s11 of the NHS and Community Care Act 1990 or s22 of the Health and Social Care (Community Health and Standards) Act 2003 have equivalent powers but Special Trustees can only accept and hold donations for the hospitals for which they were appointed to act. In addition NHS trustees may undertake fundraising activities, again provided the money is used for NHS functions and purposes, for example providing or improving services or accommodation, or in connection with research. However all relevant rules relating to fund raising by charities must be observed. Further guidance may be found in the Charity Commission’s publication “CC20 – Charities and Fund Raising”, published on their website (www.charity-commission.gov.uk).

Voluntary Organisations

30.85 In developing income generation schemes, NHS bodies should take into account any existing work by hospital voluntary groups which might be affected by those schemes. It is important that NHS bodies work closely with all relevant voluntary organisations and associated charities to ensure there is a common understanding of plans and their implications taking account of the Government’s commitments and undertakings to the Voluntary Sector set out in the “Compact on Relations Between Government and the Voluntary and Community Sector in England” (1998). This will ensure benefits are maximised and avoid misunderstandings on such issues as ongoing commitments and VAT liabilities. Trustees of NHS charities may also find it useful to refer to guidance provided by the Charity Commission on its website in relation to the issue of Charities and Public Service Delivery.

Lotteries

30.86 Lotteries can be a useful method of producing income for NHS charitable funds. They must, however, meet certain criteria provided in the Lotteries and Amusements Act 1976 as amended by the National Lottery etc Act 1993 and fall within the thresholds for taxation on charitable trading introduced following the Finance Act 2000. Some guidance on the conduct of Lotteries by or on behalf of charities can be found at paragraphs 29-35 of the Charity Commission's leaflet "CC20 Charities and fund raising".

Sponsorship

30.87 NHS bodies may enter into commercial sponsorship arrangements to raise additional income, however they should avoid entering into arrangements with organisations that are perceived as being in conflict with health, for example tobacco companies. In all cases NHS bodies, members of NHS staff and independent contractors should use local arrangements to publicly declare sponsorship or any commercial relationship linked to the supply of goods or services and be prepared to be held to account for it. Full guidance on sponsorship can be found on in the document "Commercial Sponsorship: Ethical Standards for the NHS" which is on the Department of Health website at: <http://www.dh.gov.uk/assetRoot/04/07/60/78/04076078.pdf>.

ANNEX A

LIST OF SPECIAL HEALTH AUTHORITIES

1. **Business Services Authority**
Bridge House, 152 Pilgrim Street, NEWCASTLE-UPON-TYNE
NE1 6SN
2. **Health and Social Care Information Centre**
1 Trevelyan Square, Boar Lane, LEEDS, LS1 6AE
<http://www.ic.nhs.uk/>
3. **The Health Protection Agency**
7th Floor, Holborn Gate, 330 High Holborn, LONDON, WC1V 7BA
<http://www.hpa.org.uk/>
4. **Mental Health Act Commission**
Maid Marian House, 56 Hounds Gate, NOTTINGHAM, NG1 6BG
<http://www.mhac.org.uk/>
5. **National Institute for Health and Clinical Excellence (NICE)**
MidCity Place, 71 High Holborn, LONDON, WC1V 6NA
<http://www.nice.org.uk/>
6. **National Patient Safety Agency (NPSA)**
4-8 Maple Street, LONDON, W1T 5HD
<http://www.npsa.nhs.uk/>
7. **National Treatment Agency for Substance Misuse (NTA)**
5th floor, Hannibal House, Elephant & Castle, LONDON, SE1 6TE
<http://www.nta.nhs.uk/>
8. **NHS Appointments Commission**
1st Floor, Cheapside House, 138 Cheapside, LONDON, EC2V 6BB
<http://www.appointments.org.uk/>
9. **NHS Blood and Transplant**
Oak House, Reeds Crescent, WATFORD, Hertfordshire, WD24 4QN

- 10. NHS Direct**
Strawberry Fields, Berrywood Business Village, Tollbar Way, HEDGE END,
Hants SO30 2UN
<http://www.nhsdirect.nhs.uk/>
- 11. NHS Institute for Innovation and Improvement**
University of Warwick Campus, COVENTRY, CV4 7AL
<http://www.institute.nhs.uk/>
- 12. NHS Litigation Authority (NHSLA)**
Napier House, 24 High Holborn, LONDON, WC1V 6AZ
<http://www.nhsla.com/>
- 13. NHS Logistics Authority**
St Barnabas Close, Allington, MAIDSTONE, Kent, ME16 OLW
<http://www.logistics.nhs.uk/>
- 14. NHS Professionals**
Regents Place, 338 Euston Road, LONDON, NW1 3BT
<http://www.nhsprofessionals.nhs.uk/>
- 15. Postgraduate Medical Education and Training Board**
Hercules House, Hercules Road, LONDON, SE1 7DU
<http://www.pmetb.org.uk/>

ANNEX B

HEALTH AND MEDICINES ACT 1988

Additional powers for financing Health Service

- 7.(1) In order to make more income available for improving the health service (as defined in the National Health Service Act 1977 or the National Health Service (Scotland) Act 1978), the Secretary of State shall have the powers specified in subsection (2) below; but for the avoidance of doubt it is hereby declared that nothing in this section authorises him or any body to which he gives directions under subsection (3) below to disregard any enactment or rule of law or to override any person's contractual or proprietary rights.
- (2) The powers mentioned in subsection (1) above are powers –
- (a) to acquire, produce, manufacture and supply goods;
 - (b) to acquire land by agreement and manage and deal with land;
 - (c) to supply accommodation to any person;
 - (d) to supply services to any person and to provide new services;
 - (e) to provide instruction for any person;
 - (f) to develop and exploit ideas and exploit intellectual property;
 - (g) to do anything whatsoever which appears to him to be calculated to facilitate, or to be conducive or incidental to, the exercise of any power conferred by this subsection; and
 - (h) to make such charges as he considers appropriate for anything that he does in the exercise of any such power and to calculate any such charge on any basis that he considers to be the appropriate commercial basis.
- (3) The Secretary of State may give directions (having regard to the existing work of voluntary bodies) –
- (i) for the exercise of any of those powers by any body constituted under the National Health Service Act 1977 or the National Health Service (Scotland) Act 1978; and
 - (ii) with respect to the manner in which any such body is to exercise any such power;
- and it shall be the duty of the body in question to comply with the directions.
- (4) The directions may provide that any power to which they relate shall be exercisable subject to any limitations specified in the directions.
- (5) The directions may be varied or revoked by subsequent directions.
- (6) The Secretary of State shall exercise the powers specified in subsection (2)(c) and (d) above only if and to the extent that he is satisfied that anything which he proposes to do in the exercise of those powers does not fall within section 65 of the National Health Service Act 1977 or section 57 of the National Health Service (Scotland) Act 1978.

- (7) The Secretary of State shall exercise the powers specified in subsection (2)(f) above only after consulting (to the extent that it appears to him to be practical) any person who appears to him to have an interest through his own previous research in the ideas or intellectual property in question as to whether he should exercise them and, if so, as to any financial arrangements.
- (7A) The power specified in paragraph (g) of subsection (2) above includes power for the Secretary of State –
- (a) to form, or participate in the forming of, companies,
 - (b) to invest in companies (whether by acquiring assets, securities or rights or otherwise), and
 - (c) to provide loans and guarantees and make other kinds of financial provision to or in respect of companies,
- where it appears to him that to do so is calculated to be conducive or incidental to, the exercise of any power conferred by that subsection.
- (7B) In subsection (7A) above “companies” means companies within the meaning of the Companies Act 1985; and that subsection is without prejudice to –
- (a) the generality of paragraph (g) of subsection (2) above, and
 - (b) any powers of the Secretary of State exercisable otherwise than by virtue of this section.
- (8) The Secretary of State shall exercise the powers specified in subsection (2) above only if and to the extent that he is satisfied that anything which he proposes to do –
- (a) will not to a significant extent interfere with the performance by him of any duty imposed on him by the National Health Service Act 1977 or the National Health Service (Scotland) Act 1978; and
 - (b) will not to a significant extent operate to the disadvantage of persons seeking or afforded admission or access to accommodation or services at hospitals vested in the Secretary of State for the purposes of his functions under either of those Acts (whether as resident or non-resident patients) otherwise than under section 65 of the National Health Service Act 1977 or section 57 of the National Health Service (Scotland) Act 1978.

Schedule 2: Para 15 of the NHS Community Care Act 1990

15. For the purpose of making additional income available in order to better to perform its functions, an NHS trust shall have the powers specified in section 7(2) of the Health and Medicines Act 1988 (extension of powers of Secretary of State for financing the Health Service).

ANNEX C

ACTIVITIES COVERED BY SEPARATE LEGISLATION

Activities that are covered by separate legislation should not be treated as income generation. These include:

- nursing home registration fees – *Care Standards Act 2002*;
- charges to overseas visitors - *section 121 of the National Health Service Act 1977*;
- charges for patients to access their own medical records - *Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000*;
- prescription charges - *NHS (Charges for Drugs and Appliances) Regulations 2000*;
- dental charges - regulation 19(3) of the *National Health Service (General Dental Services) Regulations 1992*. Statement of Dental Remuneration, Amendment 86;
- charges for appliances such as wigs, prosthetics - *NHS (Charges for Drugs and Appliances) Regulations 2000*;
- charges for optical services; *National Health Service (General Ophthalmic Services) Regulations 1986*.

ANNEX D

EXAMPLE OF HOW RETURN ON CAPITAL EMPLOYED IS CALCULATED

	£k	£k
Capital employed (300+400)/2 *		<u>350</u>
Gross Income	1,000	
Less: Direct Costs	<u>780</u>	
<u>Contribution</u>	220	
Less: Indirect costs and overheads #	<u>200</u>	
Net profit	<u>20</u>	

* Capital employed is calculated as the simple average of the opening and closing net assets.

Indirect costs and overheads consist of:

Notional Insurance	80
Overheads	<u>120</u>
Total	<u>200</u>

The aim was 5.5% return on capital employed ie $5.5\% \times 350 = 19.25$

Actual net profit is 20. Actual return on capital employed is therefore $20/350 \times 100\% = 5.7\%$

For further information on cost of capital, see:

<http://www.hm-treasury.gov.uk/media/768/F3/dao1303.pdf>

ANNEX E

CONTRACTS: POINTS FOR CONSIDERATION

1. Definitions/interpretation
2. Financial Period – meaning of
3. Scope of the agreement:
 - exclusions
 - exclusivity
 - geography
4. What each party is contracting to do under the agreement
5. Performance Review, scope, timing, reporting
6. Powers conferred upon each party by other under the agreement – if any
7. Collection and payment of any monies receivable including recovery of sums due
8. Payment periods
9. Production of Annual Audited Accounts – Auditors’ Fees
10. Inspection of Documents for audit purposes
11. Termination – by both parties including break clause
12. Payment of rates, taxes, utilities, cleaning, refuse disposal
13. Repair
14. Dispute resolution
15. Assignment and Sub-contracting
16. Insurance – scope
17. Indemnity against public liability, fire etc
18. Default

19. Partnership (Does the agreement constitute a partnership?)
20. Notices (serving of)
21. Intellectual Property Rights and intellectual property rights indemnity if appropriate
22. Contract period/renewal provisions
23. Price adjustment on extension of contract period
24. Contracts (Rights of Third Parties) Act 1999
25. Any confidentiality or data protection requirements
26. Environmental assessment and risk management
27. Consequences of expiry or termination (including any necessary transfer provisions)
28. Equipment
29. Installation/removal of items
30. Inspection/use of premises (including security requirements)
31. Warranties and representations
32. Corrupt gifts and payments of commission
33. Discrimination and human rights
34. Force majeure
35. Waiver
36. Variation
37. Governing law

ANNEX F

OUTLINE MINIMUM SPECIFICATION OF MEMORANDUM TRADING ACCOUNTS FOR INCOME GENERATION

1. Gross Income
2. Direct costs (see note 1 below)
3. Contribution (1 –2)
4. Indirect costs and overheads (see note 2 below)
5. Net profit (3 – 4)

Note 1. Direct Costs should include all the costs which are directly attributable to the establishment and operation of the Income Generation scheme. These will probably include staff, maintenance, depreciation, consumables, utilities, transport, administration and insurance.

Note 2. Indirect Costs and Overheads should consist of an apportionment of a fair share of the costs incurred in facilitating the income generation scheme and insurance charges.

Notional insurance should be assessed at:

- 0.01% of salaries and wages of direct staff;
- 0.25% of stock in trade; and
- 0.05% on replacement costs of fixed assets.

Note 3. Net profit/capital employed (see Annex D) expressed as a percentage = return on capital employed. This should be around 3.5% for commercial services where there is no competition or for inter- and intra-Departmental services, and 5.5% - 15% (depending on the level of risk) for commercial services where there is competition from the private sector. The return on capital employed achieved should be stated under the Memorandum Trading Account.