

Frequently Asked Questions from Potential Trust Partners Regarding Governance and Legalities

1. Are all Trusts charities?

Yes – all Trusts must be charities and will be subject to regulation by the Charity commission.

2. What does it mean to be limited by shares or guarantee?

A Company Limited by Guarantee means that an organisation becomes incorporated as a legal entity in its own right. This means agreements and contracts can be taken out in the name of the company rather than the name of individual trustee(s).

- Private company limited by shares - members' liability is limited to the amount unpaid on shares they hold.
- Private company limited by guarantee - members' liability is limited to the amount they guarantee when they join the company. Members of a Trust agree to pay a nominal sum (such as £5 or £10) to the company's assets if it becomes insolvent or is wound up.

3. Who do trusts register with Companies House, the Charity Commission or both?

For Trusts set up as charitable companies (rather than as a body incorporated by Royal Charter), Companies House is the agency which incorporates and dissolves limited companies. The Charity Commission is the regulator for charities and may investigate any complaints about the way in which the Trust is run, and has a range of powers of intervention. This will apply to all Trusts, whether or not they are required to register with the Charity Commission. If the Trust has no property other than the premises of the school, it will not be required to register with the Charity Commission. (For these purposes property includes any income from donations, investments, or the sale of goods and services.) If the Trust has any other property, it will become subject to the Charity Commission's standard regime for determining whether a charity must register, and if the Trust has an annual income of more than £5,000, it must register with the Charity commission. It is possible for charities to register voluntarily with the Commission but for the foreseeable future the Commission is unlikely to accept applications where annual income is below £5k due to demands arising from the new Act.

[NB Charitable incorporated organisations (CIOs) were introduced by the Charities Act 2006 so that charities can benefit from limited liability status without the burden of dual registration with the Charity Commission and Companies House. The provisions relating to CIOs are expected to commence later in 2009 and in the case of CIOs the liability of members may be excluded altogether.]

4. Who regulates the trusts/foundations of Trust Schools, the Companies Act or the Charities Act? [i.e. which body is responsible legally for ensuring that the trust of Trust schools is registered with the appropriate legislation e.g. the Companies Act or Charities Act]

The Trust partners and members are responsible for setting up the Trust. The trustees are responsible for the Trust once it's established. The Trust will be regulated by both the charity Commission and Companies House.

The Charity Commission is the regulator for charities (see above).

Companies House is the agency which:

- incorporates and dissolves limited companies;
- examines and stores company information delivered under the Companies Act and related legislation; and
- makes this information available to the public.

Companies House can take action for breaches of the Companies Act and is able to levy penalties; for example, all companies who file their accounts late get penalised.

5. When a company nominates a trustee is it the individual or the company that is liable?

Very few trustees who have acted honestly suffer financial loss as a result of their trusteeship. If trustees act prudently, lawfully and in accordance with their governing document, then they will not incur any personal liability for breach of trust or duty. The courts and the Charity Commission also have the power to relieve trustees from liability where they have acted honestly and reasonably.

As all Trusts of Trust schools will be body corporates they are legal entities in their own right and agreements and contracts will be entered into in the name of the organisation rather than the name of the individual trustees. Therefore, trustees of a Trust school Trust enter into contracts on behalf of the Trust and as agents they will normally have no personal liability status for the debts of the Trust.

However, they may incur liability in the following circumstances:

- Wrongful trading under the Insolvency Act 1986: continuing to trade when you know, or ought to have known, that there was no reasonable prospect of avoiding insolvent liquidation ⁴²
- Fraudulent trading: actual dishonesty in the running of the charity, such as incurring a debt where the trustees know there is little prospect of ever repaying it
- Acting as a company director when disqualified

⁴² Note that charitable companies can only trade in the course of carrying out any primary purpose of the charity.

However, incorporation does not affect the duties which trustees owe to the company. Trustees of a charitable company can still be personally liable for:

- Breach of their fiduciary and statutory duties as company directors, for example:
 - Using the charitable company's assets to procure a benefit for the trustees
 - Making a loan to a trustee

[The members of a company limited by guarantee will be liable if the company becomes insolvent only up to the amount of their guarantee (i.e. £10 in our model documents).]

6. If the trustee is an employee and they leave is it up to the company (by which we assume this to mean the member or trust partner) or the Trust to find a replacement?

Trust members take decisions about the organisation of the Trust, including how trustees are elected or appointed (although if it is a single partner Trust one organisation will appoint all the trustees). The Trust must maintain a record of trustees and members and where applicable should update Companies House and the Charity Commission about changes to trustees/ directors.

7. If a school closes, what are the legal implications for a company as follows:-

- it is the only partner
- there are other schools still in the trust

Trust schools are legally foundation schools with a foundation. When a foundation or voluntary school is discontinued and closes there is a requirement in Schedule 22 of the 1998 School Standards and Framework Act for the governing body or trustees of the school to apply to the Secretary of State to determine what happens to any land which has been provided or enhanced at public expense. If the school land was previously provided by the local authority then the Secretary of State may order that the land is returned to them or to the governing body of a new school. If the Trust wanted to retain the land for other purposes, then the Secretary of State may agree to this subject to the Trust paying such compensation to the local authority as he determines. If the school land was originally provided by the Trust at its own expense then it can do what it likes with the land. However, if the trustees' land has been enhanced in value at public expense then the local authority is able to claim a share of any sale proceeds relevant to the level of public investment. If there is a shared Trust and the other schools wish to continue the relationship, then the Trust will continue. The trustees will need to consider whether any amendments are needed to the Trust's constitutional documents.

[NB A school can't be removed from a shared Trust by the other schools in that Trust]

8. Does a Trust School hold the freehold or leasehold for the land and buildings?

This will depend on the tenure of the land transferred to the Trust (most school premises are freehold but there will be leasehold as well).

9. If a business decides to withdraw what happens to the Trust – documentation and operation?

Where there is more than one Trust Member:

A change in the membership of the Trust should have no immediate impact on the governing body, but might eventually lead to the appointment of new trustees. The Trust must maintain a record of trustees and members and should update Companies House and (if the Trust is registered with it) the Charity Commission about changes to members [see also information below on the appointment of new Members]. The governing body and local authority can review the instrument of government at any time, and provided they have the agreement of the foundation governors and the trustees of the foundation, they can make any necessary changes to the instrument of government. [None would be needed for a change in the membership of the Trust. See regulation 30 of the School Governance (Constitution) (England) Regulations 2007 for details about what is required in the GBs instrument of government.]

Sole Trust Member

If the Trust member ends the relationship for any reason then the publicly funded land will revert to the GB & the school will continue as a foundation school without a foundation. If the Trust originally provided the school's land, it must give 2 years' notice so that another site can be found if necessary (if the Trust provided land but becomes insolvent the land is protected for 3 years for the same reason).

What happens if a Trust makes a capital investment and then walks away from the school?

Whilst there is no expectation that Trusts will invest in school premises, some Trusts may wish to do so. The School Organisation (Removal of Foundation, Reduction in Number of Foundation Governors and Ability of Foundation to Pay Debts) (England) Regulations 2007 accordingly provide for Trusts to seek compensation for this capital if the Trust is subsequently removed. In such instances the Adjudicator will be empowered to determine a just amount of compensation where agreement cannot be reached.

Can the Trust add new members after the governing body has approved the Trust acquisition?

When a Trust is established the formal proposals to acquire a Trust must give details of who the members will be and how the trustees will be appointed. Once a Trust has been established new individuals or organisations may apply to be members. We advise those involved to take legal advice when drawing up the constitutional documents of the Trust to ensure that the Memorandum and Articles of Association meet their requirements and include safeguards. However, the model Memorandum and Articles of Association produced by the Department includes the following safeguards in relation to the addition of new members and these are recommended as good practice:.

Firstly, new members must be approved by either the existing Directors of the Trust (the trustees) or by the existing members of the Trust as set out in the Memorandum and Articles – in either case it requires a majority to vote in favour. The Directors or Members

would have to satisfy themselves that the proposed new Member was interested in promoting the charitable objects of the Trust. In discharging these objects they have to have regard to the obligation to promote community cohesion.

Secondly, membership of the Trust is not transferable, so any individual or organisation wishing to become a member of the Trust would have to be approved – it is not possible to become a member and then pass that membership to a different organisation or individual.