



Academy Governors - know your duties

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Contents

Introduction	2
Health Warning	2
Part 1 - Responsibilities of Academy Governors as Charity Trustees	3
Status of an Academy Trust	3
Compliance	3
Academy Governors' Duties	4
Company Directors' Duties	5
Governors' Liability	6
Part 2 - Ensuring the Academy complies with Legislation	7
Funding Agreement	7
Legislation	7
Failure to comply	8
Part 3 - Ensuring the Academy Acts within its Objects	9
Your Responsibility	9
Avoiding a Breach of the Objects	9
Part 4 - The Structure and Regulation of Exempt Charities	10
Regulation of Exempt Charities	10
The Charity Commission's Role in Academies	10
Part 5 - Conclusion	11
About Walker Morris	11
Further Reading	11

Introduction

As a governor of an academy you have a number of legal responsibilities. You have to make sure that the academy is run in accordance with the terms of the Funding Agreement entered into with the DfE and that the academy is solvent, well-run and delivers the objects set out in its Articles of Association: *"to advance for the public benefit education in the United Kingdom, in particular but without prejudice to the generality of the foregoing by establishing, maintaining, carrying on, managing and developing a school offering a broad and balanced curriculum"*. As detailed further on in this booklet, the consequences of not complying with your responsibilities as a governor of an academy can be serious.

In order to guide you through what can seem like a legal minefield, we have put together this handy booklet to summarise your key duties and responsibilities as a governor of an academy. Should you require further advice and guidance we are a phone call away.

This booklet is divided into three parts. The first part sets out the duties you have as an individual governor of an academy. This includes the duties which arise because, as a governor of an academy, you are also a company director and a charity trustee. The second and third parts of this booklet set out the duties of the academy itself as an exempt charity, which you as a governor must ensure the academy fulfils.



As a company director you have to comply with company law. Our Little Green Book of Directors' Duties sets out everything you need to know in a manageable format. For a free copy, please contact the Marketing department on +44 (0)113 283 2500 or email jillian.szajko@walkermorris.co.uk

HEALTH WARNING

This booklet is intended for governors of academies only. It has been produced to act as useful guidance and should not be relied upon as a replacement for obtaining legal advice.

If you need specific advice on a matter of academies or charity law, please contact David Kilduff or Richard Auton, whose details are listed on page 11.

Part 1 - Responsibilities of Academy Governors as Charity Trustees

STATUS OF AN ACADEMY TRUST

In order to understand the obligations you must comply with as a governor of an academy, you need to understand the status of an academy. An academy trust is always a company limited by guarantee, and its governing document is its Articles of Association. All academies have two layers of governance:

- members of the trust (akin to shareholders)
- governors (responsible for core strategic governance functions). Governors are directors of the company and trustees of the academy trust (which is a charity).

In multi-academy trusts, the DfE recommends that there should be some distinction between trustees and members, so that members who are independent of the trustees can provide internal challenge and scrutiny. Single school academies should consider which structure is most effective for its circumstances. This could be a flat structure in which all the trustees are also members. The DfE recommends each trust has a minimum of five members.

The Articles for every academy will be based on the standard DfE form of Articles, which will have been amended to reflect the particular governance structure of the academy, e.g. who will act as members and governors, and how such people will be appointed. The academy trust is also a charity, which means it is subject to charity law.

As a company, an academy is regulated by Companies House, but as an academy and education provider, it is also regulated by the DfE. Whilst an academy is also a charity, it is not regulated by the Charity Commission directly because it already has two principal regulators. An academy is therefore an exempt charity and is not required to register with the Charity Commission directly. The governors, however, must comply with and abide by the rules set by the Charity Commission in respect of their duties and responsibilities as charity trustees of an exempt charity.

Governors clearly have a lot to think about to ensure compliance, and the aim of this booklet is to help you to comply with your varied duties.

COMPLIANCE

The governors of an academy are charity trustees for the purposes of charity law and company directors for the purposes of company law. The governors of an academy must therefore comply with:

- the academy's Articles of Association, which will largely reflect the DfE's standard document, which sets out the governance structure of the academy
- the provisions of the Funding Agreement with the DfE which sets out the way the academy should be run
- the charity trustee duties and responsibilities as set out in charity law
- the director duties and responsibilities set out in company law

It is crucial that you, as a governor, charity trustee and company director, are aware of your duties; if you are found to be in breach you can be disqualified from office, subject to a fine and called to account for any profits made.

ACADEMY GOVERNORS' DUTIES

Articles of Association

An academy is governed according to its Articles of Association. Although the Articles of Association for each academy will reflect a particular academy's governance structure, each is based on the DfE standard version and so the duties and responsibilities imposed on governors within the Articles will be the same for each academy. In accordance with its Articles of Association, the governors must:

- act in accordance with the charitable object of the academy trust (that is, the advancement of education in the UK for public benefit, specifically by maintaining, carrying on, managing and developing a school offering a broad and balanced curriculum). Funds and property of the Academy Trust must only be used to promote this object. In some limited circumstances you may have an additional charitable object
- avoid conflicts of interest - a governor must declare any interest they have in relation to any matter and must not take part in a vote on that issue. This includes any interest of a governor's child, stepchild, parent, grandchild, grandparent, brother, sister or spouse or any person living with the governor as his or her partner. Similarly, the employment or remuneration of a Governor includes "*the engagement or remuneration of any firm or company in which the Governor is a partner, an employee, a consultant, a director, a member, or a shareholder unless the shares of the company are listed on a recognised stock exchange and the Governor holds less than 1 per cent. of the issued capital*"
- not benefit from their role as governor
- hold at least three meetings of the governors in every school year. At the first meeting of the year, the governors must appoint a chairman and vice chairman, neither of whom should be employed by the academy. Governors also need to ensure that the notice and quorum requirements for the meetings of the governors are complied with
- ensure that the agenda, draft minutes, signed minutes and any report considered at a governors' meeting are made available at the academy as soon as reasonably practicable for anybody wishing to inspect them
- prepare and file with the Secretary of State and Department of Education annual accounts and an annual report by 31 December each year
- prepare an annual return for the Registrar of Companies and file it with the Secretary of State and the Department of Education by 31 December each year
- call meetings on behalf of the members including the annual general meeting.

Charity trustees' duties

There are also duties imposed on you as a charity trustee, by common law and by statute. As a governor of an academy some of the duties imposed on you apply to all types of charity and others apply specifically to companies limited by guarantee and exempt charities.

Common law duties: all charities

The Charity Commission states that charity trustees have and must accept ultimate responsibility for directing the affairs of a charity, and for ensuring that it is solvent, well-run, and delivers its charitable objectives for the benefit of the public.

As a charity trustee, you have duties that arise from your 'fiduciary relationship' (i.e. the fact that you have an obligation to act in the best interests of the charity).

Your duties are:

- to act in the best interests of the charity
- to avoid conflicts of interest
- to not benefit from your role as a charity trustee
- to use charity resources for the charitable purpose
- undivided loyalty - this means that you should not put yourself in a position where your duty to someone/something else conflicts with your duty to the charity
- confidentiality - this means you must only disclose information which is obtained in confidence from the charity if it is for the benefit of the charity

These common law duties overlap with a number of the statutory duties.

Charity law duties: all charities

Despite not being directly regulated by the Charities Commission, a governor of an academy is still a charity trustee and so is subject to charity law duties. As a charity trustee you must:

- ensure that the academy complies with charity law and with the applicable requirements of the Charity Commission for exempt charities (as set out in Part 4 below)
- ensure that the academy does not breach any of the requirements or rules set out in its Articles of Association (as detailed above) and that it remains true to the charitable objects set out in them. (See the paragraph 'Avoiding a Breach of the objects' below for more detail on charitable objects)
- comply with the requirements of other legislation and other regulators (Companies House and the DfE) which govern the activities of the academy
- act with integrity, and avoid any personal conflicts of interest or misuse of academy funds or assets.

As a charity trustee, you also have a duty of prudence. You must:

- ensure that the academy is and will remain solvent
- use charitable funds and assets reasonably, and only in furtherance of the charity's objects and the powers set out in the academy's Articles of Association
- avoid undertaking activities that might place the academy's endowment, funds, assets or reputation at undue risk
- take special care when investing the funds of the academy, or borrowing funds for the academy to use.

COMPANY DIRECTORS' DUTIES

As a governor of an academy, you will be a director of a company limited by guarantee and will therefore need to abide with company law. Most of these duties are contained within sections 170 - 177 of the Companies Act 2006.

The Companies Act 2006 duties are:

- to act in accordance with the academy's Articles of Association
- to only exercise the powers for the purpose for which they are conferred

- to act in a way that the governor considers, in good faith, is most likely to promote the success of the academy
- to exercise independent judgement
- to exercise reasonable care, skill and diligence
- to avoid conflicts of interest
- not to accept benefits from third parties conferred by reason of them being a governor
- to declare any direct or indirect interest in an existing or proposed transaction with the academy.

As a governor of an academy and a director, you may find Walker Morris' Little Green Book of Directors' Duties useful. (See page 2 for how to obtain a copy).

GOVERNORS' LIABILITY

It is important for you as a governor to consider and abide by your duties, as the potential consequences of failure to do so could be damaging.

The dangers

In the event of a breach of duty, the Articles allow for a governor to be removed by the person(s) who appointed them.

Furthermore, if the academy sustains some kind of loss as a result of a governor's breach of duty, the other governors may decide to sue the individual governor for the loss.

In the event of a serious breakdown in the way in which the academy is being managed or governed, the Articles allow the Secretary of State to serve a warning notice upon the academy requiring specific action to be taken to improve the management or governance of the school. If the academy fails to comply with a warning notice, the Secretary of State may appoint new governors. Existing governors would be required to resign and members' power to appoint new governors would be suspended until the Secretary of State decided that the new governors could be removed.

You also need to be aware of the potential consequences of breach of your duties as a director and the wide range of penalties which Companies House has at its disposal in this regard. These include disqualification as a director for between two and fifteen years, criminal charges, a fine and/or being held personally liable for the company's debts.

What you can do

You should be particularly careful when entering into substantial contracts or borrowings to ensure that the charity has the means to meet its obligations.

You can be insured by your charity against personal liability where it is in the charity's interests. The Charities Act 2011 allows almost all charities to buy trustee indemnity insurance policies. There are certain limitations; for example, the policies cannot include cover for criminal fines or penalties, a trustee's costs in defending criminal proceedings if he or she is convicted of fraud, dishonesty or reckless conduct, or where the trustee's liability results from a deliberate disregard of the charity's interests.



Part 2 - Ensuring the Academy complies with legislation

FUNDING AGREEMENT

An academy's financial requirements are set out in the Education Funding Agency's '[Academies Financial Handbook](#)' and in its funding agreement. Governors should also read the 'Academies Accounts Direction 2013', when preparing and auditing annual reports and financial statements for the 2013 accounting year.

The funding agreement with the Department of Education sets out the terms on which funding is granted to the Academy. Governors must ensure that the academy complies with the provisions of the funding agreement including:

- conducting enhanced criminal record checks on all of its staff, supply staff and governors
- acting in accordance with all relevant statutory and regulatory provisions and having regard to any guidance
- ensuring that all teachers at the academy are qualified or taking steps to ensure that they become so qualified as soon as possible
- providing all staff with access to the relevant pension scheme (depending on whether they are teachers and therefore eligible for the Teachers Pension Scheme or non-teachers who are eligible for the Local Government Pension Scheme)
- fulfilling various requirements with regard to the curriculum and assessment of pupils complying with various budgeting requirements including: submitting an annual budget to the Secretary of State which is not in excess of its expected income; not entering into agreements which have substantial implications for future levels of grant; appointing an Accounting Officer; ensuring abidance with the Academies Financial Handbook published by the Department of Education regarding the use of the grant paid by the Secretary of State; and filing Accounts, an Annual Return, financial statements and the Directors' Report at Companies House.

The 'Academies Accounts Direction 2013' outlines the requirements set out in academy trusts' funding agreements with the Secretary of State. Each academy trust must:

- prepare an annual report and financial statements to 31 August
- have these accounts audited annually by independent registered auditors
- deliver a statement of regularity, propriety and compliance and obtain a regularity assurance report on this statement from the auditor
- submit the audited accounts and auditor's regularity assurance report to the Education Funding Agency by 31 December
- file the accounts with the Companies Registrar as required under the Companies Act 2006

New academy trusts incorporated on or after 1 March may, if they wish, defer preparation of their first accounts until 31 August the following year.

LEGISLATION

Like any other organisation, academies have to abide by the law. As well as the funding agreement, the following may apply depending on the circumstances of the academy:

- education law
- employment law

- the terms of a lease
- occupier's liability
- disability discrimination e.g. access
- health and safety legislation (for staff and pupils)
- equalities legislation
- freedom of information and data protection legislation
- public procurement legislation, which may require you to go out to tender for some contracts rather than appointing suppliers directly
- sector-specific regulation (for example regulation on working with children and child protection).

It is an essential job of a governor that you ensure that your academy complies with all applicable legislation. You may need to seek legal advice to ensure the practices of your academy are lawful.

FAILURE TO COMPLY

Potential liability

In the event of a breach of the funding agreement, the Secretary of State is able to serve a warning notice upon the academy requiring specific action to be taken to improve the management or governance of the academy. If improvements are not made, the Secretary of State may appoint additional or replacement governors and may suspend members' right to appoint governors until further notice. Ultimately, if the academy fails to act in accordance with the funding agreement, the Secretary of State may give the academy notice to terminate the funding agreement. This would ultimately result in the school being closed.



If an academy fails to comply with all applicable legislation and regulation, the governors may face some difficult consequences such as:

- fines, penalties or censure from the DfE
- claims for unfair dismissal
- claims for damages
- reputational damage.

What you can do

All of these consequences could damage the academy significantly and may even result in the academy being forced to dissolve. It is therefore important that you comply with all applicable regulation and ensure that your academy acts within the appropriate statutory and regulatory regime. You can minimise any risk by:

- identifying key legal and regulatory requirements
- allocating responsibility for key compliance procedures
- putting in place compliance monitoring and reporting procedures
- preparing adequately and properly for compliance visits
- obtaining compliance reports from regulators where appropriate.

Part 3 - Ensuring the Academy acts within its objects

It is your duty as a governor to ensure that your academy acts within the objects and powers set out in its Articles of Association.

YOUR RESPONSIBILITY

You have, and must accept, ultimate responsibility for directing the affairs of your academy, ensuring that it is solvent and well-run, and delivering the charitable outcomes for the benefit of the public for which it was set up.

Your decisions about activities or services must be directed by the academy's objects. You should be able to explain how all of the academy's activities relate to and support its purposes and benefit the public.

AVOIDING A BREACH OF THE OBJECTS

These are some things that you should consider when considering any new activity:

- is the activity consistent with the academy's objects and powers?
- how will it meet the needs of the academy's beneficiaries (e.g. the pupils)?
- how will it be funded?
- has the academy fully assessed the risks and taken steps to mitigate them?



Part 4 - The structure and regulation of exempt charities

Academies are exempt charities. This means they have a 'principal regulator' appointed to them by the government - the DfE - and they are therefore not directly regulated by the Charity Commission. The DfE has the responsibility and powers to:

- promote trustees' compliance with their legal obligations to control and manage their charity
- monitor charity law compliance
- ask the Charity Commission to open an inquiry (but cannot investigate themselves)
- work with the Charity Commission to ensure that exempt charities are accountable to the public.

REGULATION OF EXEMPT CHARITIES

Exempt charities have charitable status and must therefore comply with general charity law. Trustees of these charities must also comply with other applicable regulation including company law as appropriate.

Exempt charities:

- cannot register with and are not regulated by the Charity Commission. They must not describe themselves as registered or use a registered charity number
- are publicly accountable and must produce accounts
- have different requirements regarding dispositions of land than other charities. The Charity Commission requires trustees to seek legal advice in this respect.

Exempt charities must comply with:

- general charity law
- their governing document, in this case the academy's Articles of Association
- regulation specific to their:
 - area of operation i.e. education law
 - charitable structure i.e. company law.

THE CHARITY COMMISSION'S ROLE IN ACADEMIES

The Charity Commission is able to:

- require an exempt charity to change its name
- open a statutory inquiry over an exempt charity
- call for information and documents
- use protective powers to suspend or remove trustees, freeze accounts, etc.

Exempt charities may seek support (where applicable) from the Charity Commission including:

- while the DfE should provide initial support for academies, the Charity Commission can be contacted where there are complex queries
- in the case that governors wish to do something that would be of benefit to their academy but that is not within the powers conferred by its Articles of Association, as long as it is not precluded by an Act of Parliament, the Charity Commission may be able to authorise the governors to act by way of an Order.

Part 5 - Conclusion

We hope that you have found the information contained in this booklet useful, interesting and informative. Please remember that this booklet is for guidance only and you should not rely on it for legal advice. If you need specific advice on a matter of academies or charity law, please contact David Kilduff or Richard Auton whose details are listed below. We will be happy to hear from you and advise you.



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ABOUT WALKER MORRIS

Walker Morris is a firm of solicitors based in Leeds but serving clients throughout the UK: 71 per cent. of our clients are based outside Yorkshire. We can trace our origins back almost 130 years to the 1880s. Over the past decade we have more than quadrupled in size and now employ over 500 staff, which ranks the firm in the leading 100 UK law firms. We are ranked by independent assessors among the top UK law firms for the number of recognised legal specialists in our teams.

We have invested significantly in our Education Group over the years, ensuring that we have specialist lawyers in the range of disciplines likely to be required by educational institutions. We can therefore offer an Education Group drawn from across the firm to provide specialist advice as and when it is required.

FURTHER READING

There is extensive guidance available on all the topics covered in this booklet (and more) on:

- The academies pages of the DfE website <https://www.gov.uk/government/collections/academy-conversion-process>
- The Charity Commission website - www.charitycommission.gov.uk.

We recommend the following in particular for further reading:

- Governors' Handbook - <https://www.gov.uk/government/publications/governors-handbook--2>
- Charity Commission guidance:
 - *CC3 - The Essential Trustee: what you need to know*
 - *CC10 - Hallmarks of an Effective Charity*
 - *Academy Schools: guidance on their regulation as charities*
 - *Charities and charity trustees: an introduction for school governors.*