

BRIEFING

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## Academy Trust Governance: The role of members and “persons with significant control”

### Background

All academy trusts (“Trusts”) are private companies limited by guarantee and are therefore subject to company law and specifically the provisions of the Companies Act 2006. The Articles of Association form the Trust’s constitution and are in effect a contract between the company and its members (there are no fines for non-compliance with the Articles). As an exempt charity (i.e. exempt from registration) the Trust is also subject to charity law and the provisions of the Charities Act 2011. The principal regulator is the Secretary of State for Education (“SoS”).

### Who are the Members?

All companies must have at least one Member, academy trusts, according to their Articles, must have at least three. The Department for Education’s (DfE) policy is that Trusts should have five to avoid deadlock when passing a special resolution requiring a 75% majority. The Members are those individuals (or companies) who have agreed to be Members and whose names have been entered onto the Register of Members, a register which must be kept by the Trust. Members’ details are not filed with Companies House. The subscribers or signatories to the Memorandum of Incorporation will automatically be the initial Members.

In most cases, the Members will simply be those individuals who agreed to establish the Trust, with subsequent Members being appointed by the Members as and when desired. In some cases, particularly for Trusts established to operate academies with a religious character or Trusts founded by a sponsor or other non-religious

foundation, the Members will be either the foundation or sponsor (such as a Diocesan Board of Education (DBE) or the Diocesan Bishop) or individuals appointed by the sponsor or foundation or, indeed most commonly, a combination of the two. Members can be either individuals or other corporate or statutory bodies.

### Who are the Trustees?

The Trustees of the Trust are those people responsible for the carrying out of the business of the charity/Trust, i.e. the running of the academies, though management responsibility will be delegated further still to a management board or leadership group made up of executive officers (such as the “Chief Executive Officer”) and the headteachers of the academies. The Trustees will also be the directors of the Trust, given the Trust is a company, and will be under a fiduciary duty to act in the best interest of the Trust. Members do not have the same fiduciary responsibility.

### Can Members be Trustees?

It is possible for a Member to also be a Trustee and this is common in the wider charity sector where the Articles will state that the Trustees are the Members (and the Members are the Trustees). This should be contrasted with membership charities, like the National Trust, where the membership is a much larger group who commit to a particular ideal or objective and may in some way benefit from the activities of the charity. This is an exception to the general rule that Members must not benefit from the Trust and it is for this reason that Trusts do not allow any distribution of profit by way of a dividend to Members. The DfE

has gone further and the Articles prohibit employees of the Trust being Members.

The DfE's Governance Handbook (latest edition was published in November 2015) recommends that there is separation between the Members and the Trustees of an academy trust so that Members can properly hold Trustees to account. Some limited overlap is permitted though.

### **What do Members do?**

The Members determine the ethos and purpose of the Trust (i.e. the provision of education) and the way it will be governed (which will be set out in the Articles of Association) and will have a right (not an obligation) to participate in governance by appointing and removing Trustees. They also have a right to receive the Trustees' annual report and accounts and to attend general meetings of the Trust.

The Members may also agree either that certain conditions must be observed in the conduct of the Trustees or that certain decisions about the Trust can only be made by the Members (either collectively or individually). For example, that the Trust (and the academies by implication) will be operated in accordance with a set of religious values as determined by the appropriate diocesan authority and that the Trustees will be appointed by one of the Members, i.e. the Bishop or the DBE. These conditions may be set out in a separate "Members Agreement" or more typically a "Memorandum of Understanding" and may deal with a range of specific issues. Care should be taken however to avoid undue influence over the Trustees, unless this is supported by a regulatory regime or is imposed as a condition of some other arrangement e.g. the use of significant assets such as land, otherwise trustee type liability may be inadvertently assumed by the Members.

Members may enforce provisions of the Articles against other Members and/or the Trust, though this is rare. Typically a regulator (Charity Commission or the SoS for Education) will be reluctant to become embroiled in any dispute between the Members and between the Members and the Directors/Trustees as it is properly an internal matter, but if the dispute affects the fulfilment of the charitable purpose, the DfE/EFA may become involved with appropriate reference to the Charity Commission.

### **Legal Responsibilities of Members**

Members of companies limited by guarantee are responsible only for contributing to the Trust's capital on winding up to the limit of the guarantee set out in the Articles, typically £10.

Members of charitable companies (e.g. academy trusts) usually provide an additional layer of accountability (for the fulfilment of the charitable object) and can scrutinise the actions of the Directors/Trustees but do not have rights to become actively involved. If a Member does become involved then it is likely they will be bound to act in a fiduciary capacity (i.e. in the best interest of the Trust) but there is no obligation on them to become involved. The extent of any legal duty is the subject of debate and further legal advice on any specific issue would be needed.

### **What control does the SoS have over Members?**

The SoS as regulator has no direct control of Members and for example cannot remove a Member or appoint a Member, nor indeed can she appoint or remove a Trustee. The SoS's power is primarily focussed on the Trust as an entity, through the provisions of the Funding Agreement supplemented by legislation and regulations. Whilst the role of the SoS is similar to that of the Charity Commission, which regulates all charities, as an academy trust is not registered in the same way as a charity is, the removal of registration is not open to the SoS. Any complaint which goes to the actions of the Trust (including the way it is being governed) is likely to result in the service of a warning notice or termination notice under the Academy Funding Agreement, removing in effect the ability of the Trust to run one or indeed all of its academies.

### **Obligation to maintain a register of "Persons with Significant Control"**

A new regime designed to aid the transparency of ownership of companies was introduced by legislation on 6<sup>th</sup> April 2016. The new "persons with significant control" (PSC) regime requires all companies, i.e. including academy trusts, to maintain a PSC register, in the same way that Trusts must have a register of members and a register of directors. From 30<sup>th</sup> June companies

will need to provide details from their PSC register to Companies House and new companies incorporated after that date will have to provide details of any PSC on incorporation.

The regime is largely set out in a new Part 21A to the Companies Act 2006 and The Register of People with Significant Control Regulations 2016 (currently in draft form). The rules are complex and legal advice will be required where the circumstances are unusual.

### Who are PSCs?

An individual is a PSC if he or she satisfies any one of the following conditions:

- (i) The person holds, directly or indirectly, more than 25% of the shares in the company;
- (ii) The person holds, directly or indirectly, more than 25% of the voting rights in the company;
- (iii) The person holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the company;
- (iv) The person otherwise has the right to exercise, or actually exercises, significant influence or control over the company;
- (v) The person has the right to exercise, or actually exercises, significant influence or control over an arrangement such as a trust which is not a legal entity but which meets any of the other specified conditions in relation to the company, or would do so if it were an individual.

As academy trusts do not have any share capital, condition (i) is not relevant (though might be for companies who are PSCs – see below). A Trust which has set up a trading company will be a PSC of the trading company (assuming it's wholly owned which is usually the case).

A Member of a Trust may qualify as a PSC if he or she is one of only three Members as each Member has one vote and therefore the voting rights are split equally with each nominally having 33% of the vote. Trusts are advised to appoint more Members (at least five) and may need to consider the Articles before doing so. We can advise further if needed.

Notwithstanding the number of Members, an individual may qualify as a PSC if he or she

exercises significant control or influence in another way such as having a sole right to appoint a majority of the Trustees. This would be typical of diocesan authorities i.e. the Bishop and individual sponsors. This will depend on what the Articles say as well as any other document or regime that applies, e.g. any Members Agreement, Memorandum of Understanding or for example the Diocesan Board of Education Measure 1991. Control may also be implied as a consequence of the Member controlling a significant asset upon which the Trust is dependent, e.g. the land the academy occupies, but again this will depend on how usage is controlled. If there is a letting arrangement in place control is unlikely. The typical "Church Supplemental Agreement" is also unlikely to qualify as significant control or influence, on its own, but there may be other factors. Regulatory control, such as that which might be exercised by the SoS is excluded from the regime.

### What about if the PSC is another company?

Whilst the regime is primarily focussed on individuals who exercise control, the regulations allow for a "look through" of holding companies who themselves may be controlled by individuals (referred to as "registrable relevant legal entities"). So, where a Trust has a Member which itself is a company and which satisfies one of the 5 conditions set out earlier, then either that company is named in the PSC register or the Trust is obliged to investigate further to determine who controls the parent company. A Trust can only name another company on the PSC register if that company is itself both subject to the regime and has a PSC register.

It is a criminal offence for a Trust not to have a PSC register and for the register to not say anything. Additional powers have been given to companies to serve notices on people and companies to disclose relevant information to complete the PSC register. It is a criminal offence for a person served with an appropriate notice not to disclose relevant information.

### Information required for the PSC register

We can provide an example register but broadly the register must set out the following information:

- Their name
- Their date of birth
- Their nationality
- The country or part of the UK where the PSC usually lives
- Their service address (which Companies House will also use)
- Their usual residential address
- The date the individual became a PSC (which will be 6<sup>th</sup> April 2016 for all existing companies)
- The specific condition or conditions which gives the PSC significant control or influence
- Any restrictions on disclosing the PSC's information that are in place

Where there are no PSCs the register must state "The company knows or has reasonable cause to believe that there is no registrable person or registrable relevant legal entity in relation to the company."

**For further information, please speak to a member of our School Support Service team:**

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