



Department
for Education

Exempt charities and the role of the Secretary of State as Principal Regulator

**Departmental advice for academy trusts,
sixth form colleges, voluntary aided,
voluntary controlled and foundation trust
schools**

February 2014

Contents

Summary	3
About this departmental advice	3
Who is this advice for?	3
Key points	3
Regulation of exempt charities	4
What are exempt charities?	4
The Secretary of State for Education as Principal Regulator	5
Requirements and duties of exempt charities	6
Accounts, auditing and annual reports	6
Trustee's duties and responsibilities	6
Directors' duties	7
Academies	7
Foundation schools	8
Voluntary schools	8
Sixth form colleges	8
Concerns and complaints	9
Charities Act 2011	10
Statutory instruments	10
Charitable purposes	10
Public benefit and Public Benefit reporting	11
Exempt Charities: Frequently Asked Questions	12
Further sources of information	19
Associated resources (external links)	19
Other departmental advice and guidance you may be interested in	19

Summary

About this departmental advice

This is advice from the Department for Education. This advice is non-statutory, and has been produced to help academies, sixth form colleges and voluntary aided, voluntary controlled, and foundation trust schools understand their status as exempt charities.

Expiry or review date

This advice will next be reviewed periodically.

Who is this advice for?

This advice is for academy trusts, sixth form colleges, voluntary aided, voluntary controlled and foundation trust schools.

Key points

Academies, sixth form colleges, voluntary aided, voluntary controlled and foundation trust schools are exempt charities. Such institutions are not registered or directly regulated by the Charity Commission (“the Commission”); they are instead regulated by a Principal Regulator. Exempt charities must have charitable purposes and apply them for the public benefit and they must comply with charity **and** company law.

Regulation of exempt charities

What are exempt charities?

Academies, sixth form colleges, voluntary aided, voluntary controlled and foundation trust schools are exempt charities. These institutions are not registered or directly regulated by the Charity Commission (“the Commission”); they are regulated by a Principal Regulator. In general terms there is little difference between exempt charities and charities registered with the Commission.

Exempt charities must have charitable purposes and apply them for the public benefit. They must comply with the general law of charity. They have trustees who are responsible for the control and management of the administration of their charities. They benefit from the same tax advantages as registered charities, and have the same obligations to comply with tax law.

Exempt charities should not describe themselves as registered and may not use a registered charity number even if they had one previously. An institution administered by or on behalf of an exempt charity is also an exempt charity, e.g. an academy or sixth form college endowment fund, if it should have one, would also be an exempt charity.

The Academies Act 2010 makes significant changes to the framework for academies. It deems that all academies approved by the Secretary of State are automatically charities and that all existing academies became exempt charities when the Secretary of State for Education became their Principal Regulator.

N.B Academy Umbrella Trusts are **not** exempt charities and may need to register directly with the Commission, if they have a charitable purpose and their income exceeds £5000 per annum.

Foundation and voluntary (aided and controlled) schools, including foundation special schools became exempt charities under section 21 of the **School Standards and Framework Act 1998**.

The **Further and Higher Education Act 1992**, made provision for sixth form colleges to become exempt charities.

The Secretary of State for Education as Principal Regulator

On 1 August 2011, the Secretary of State for Education became the Principal Regulator for foundation and voluntary schools, academies and sixth form colleges. The Secretary of State for Education is one of several principal regulators. All principal regulators have a duty, as far as they reasonably can, to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of the charity.

In practice the Principal Regulator will want to ensure that:

- trustees are sufficiently informed about their duties;
- charity assets are being applied correctly and consistently with the terms of the governing document and charity law;
- information about the exempt charity is readily available to the public (e.g. via a website).

As of January 2014, the Secretary of State for Education as Principal Regulator regulates over 11,000 institutions. This number will continue to increase as more academies and free schools open.

Information about academies, free schools, voluntary and foundation and sixth form colleges can be found on [Edubase](#).

Requirements and duties of exempt charities

Accounts, auditing and annual reports

All exempt charities are publicly accountable and must produce accounts under their own legal framework or principal regulator requirements.

Exempt charities must:

- keep proper accounting records;
- prepare consecutive statements of account consisting of an income and expenditure account and a balance sheet relating to the end of the accounting period;
- keep these records and statements for at least six years, unless the charity ceases to exist and the Commission gives written consent.

Exempt charities that are also companies, such as academies which are charitable companies limited by guarantee must prepare accounts in accordance with the Companies Act 2006 that give a 'true and fair' view and are expected to follow best practice (including Statement of Recommended Practice – Accounting and Reporting by Charities).

Exempt charities must provide copies of their most recent accounts to anyone who makes a written request within two months. Those that are companies operating under company law must publish their accounts in accordance with the Companies Act 2006.

Trustee's duties and responsibilities

The trustees of an exempt charity have the same general duties and responsibilities as trustees of other charities, including:

- acting reasonably and prudently in all matters relating to the charity;
- always acting in the best interests of the charity;
- applying the income and property of the charity only for the purposes set out in the governing document;
- protecting the property of the charity;
- investing the funds of the charity only in accordance with the powers of investment;

- regularly review the effectiveness of the charity.

Directors' duties

The trustees of charities that are companies will also be directors under company law. The directors will have the following duties:

- to act within powers;
- to promote the success of the company;
- to exercise independent judgement;
- to exercise reasonable care, skill and diligence;
- to avoid conflicts of interest;
- not to accept benefits from third parties;
- to declare interest in proposed transaction or arrangement;

Academies

Each academy trust has, as its charitable object, the 'advancement of education for public benefit'. This and other details about the accounts and reports the academy trust must produce will be set out in an academy trust's governing document, known as its Memorandum and Articles of Association.

Academies are run by non-profit making charitable trusts. Where academies have a sponsor, those sponsors are not permitted to make a profit from their involvement with the academy.

Academy trusts are accountable to the Secretary of State through their Funding Agreement. The Funding Agreement also includes details about the financial information an academy trust must produce. Academy trusts are also required to publish information about its curriculum and most recent Key Stage 2 and Key Stage 4 results. They must also provide clear information where current and prospective parents can find the academy's most recent Ofsted report and school performance tables.

The Department provides model documents for the Memorandum and Articles of Association and Funding Agreement which can be used for both primary and secondary academies. They can be downloaded from the DfE Academies website.

Foundation schools

Foundation schools are maintained schools. They can be established in one of two ways, as explained below. In either case the governing body (a corporate body created under the SSFA 1998) is a charity and its governors are charity trustees. The school is the charitable activity of the governing body charity.

- Some foundation schools have a foundation (sometimes called a trust), a separate charity which holds the title to the land and buildings on trust for the provision of the school. The members of the trust are its charity trustees. The two charities work interdependently. The trust also appoints some of the governors – the number will be specified in the school's Instrument of Government.
- Some foundation schools do not have a foundation (or trust). The governors run the school and hold the land and buildings; they are the only charity trustees.

Voluntary schools

Voluntary (aided or controlled) schools are also maintained schools. They usually comprise two charities that work interdependently:

- The governing body, a corporate body created under the SSFA 1998, which runs the school;
- The charity usually called the foundation (or trust), which holds the land and buildings on trust for the provision of a school and/or for specified religious and educational purposes.

Each of these charities has its own charity trustees. The foundation appoints some of the school's governors:

- a majority in the case of voluntary aided schools; or
- a minority for voluntary-controlled schools.

The 'school' is the charitable activity of the governing body, not an entity in itself.

Sixth form colleges

Sixth form colleges are independent, autonomous institutions. A series of recent reforms to the sector, including those introduced in the Education Act 2011, have given the sector greater autonomy and flexibility.

The governance arrangements for sixth form college corporations are set out in their instruments and articles of government. The first instrument of government and articles of

government of a sixth form college corporation are issued by the Secretary of State. A sixth form college may subsequently modify or replace these documents, with the consent of the trustees, subject to a light touch set of requirements and compliance with legislation.

Sixth form colleges also now have the freedom: to borrow / form a company for the provision of education without seeking prior consent; dissolve itself, and to transfer its property, rights, and liabilities.

Sixth form college corporations are also accountable to the Secretary of State through their Funding Agreement which includes details about the financial information a Corporation must produce.

Concerns and complaints

If a member of the public or a member of staff has concerns about an academy or sixth form college, either related to the Principal Regulator role or in general, and wants to discuss these further they should contact the Education Funding Agency (EFA). This can be via the Department for Education's website through the [contact us](#) page. Further information is available on the EFA's complaint procedure for academies and [sixth form colleges](#).

Memorandum of Understanding with the Charity Commission

The Department for Education has entered into a Memorandum of Understanding with the Commission (MOU) which sets out the protective and support powers of the Commission and a summary of the Secretary of State's key responsibilities. The MOU can be viewed and downloaded from the [Commission's website](#);

If the Department or the Commission has identified concerns about the control and management of the administration of an exempt charity it will notify the other party and include information about any charity law issues it has identified, before it advises the relevant body of any action it proposes to take.

The Department may ask the Commission to use any of its regulatory powers or indicate that those powers may be required at some stage during the conduct of the case. In such cases the Department for Education will provide all relevant and appropriate information.

Charities Act 2011

The Charities Act 2006 made a number of important changes to the general law that applies to all charities. It did this by amending the Charities Act 1993. The 1993 and 2006 Acts have been consolidated in the Charities Act 2011 which came into effect on 14 March 2012. It contains provisions that apply to exempt charities and are, therefore, of direct interest to foundation and voluntary schools, academies and sixth form colleges and the Department for Education.

Statutory instruments

The provisions of the 2006 Act that designate and empower the Secretary of State for Education came into effect on 1 August 2011.

Charitable purposes

The Charities Act 2006 contains a list of 12 specified charitable purposes (provided those purposes are for the public benefit). They remain the same in the Charities Act 2011. It is possible for other purposes to be charitable if they are similar to, or in the spirit of specified purposes, or if they have previously been recognised as charitable.

The 12 specified charitable purposes are:

- prevention or relief of poverty;
- advancement of education;
- advancement of religion;
- advancement of health or saving of lives;
- advancement of citizenship or community development;
- advancement of the arts, culture, heritage or science;
- advancement of amateur sport;
- advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity;
- advancement of environmental protection or improvement;
- relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- advancement of animal welfare;

- promotion of efficiency of the armed forces of the Crown, or of the police, fire and rescue services or ambulance services.

Public benefit and Public Benefit reporting

Any purpose must be for the public benefit if it is to count as a charitable purpose and trustees are required to report on public benefit. There are two key principles to public benefit:

- Principle 1 – There must be an identifiable benefit or benefits;
- Principle 1a – it must be clear what the benefits are;
- Principle 1b – the benefits must be related to the aims;
- Principle 1c – benefits must be balanced against any detriment or harm;
- Principle 2 – Benefit must be to the public, or section of the public;
- Principle 2a – the beneficiaries must be appropriate to the aims;
- Principle 2b – where benefit is to a section of the public, the opportunity to benefit must not be unreasonable restricted:
 - by geographical or other restrictions, or
 - by ability to pay any fees charged.
- Principle 2c – people in poverty must not be excluded from the opportunity to benefit;
- Principle 2d – any private benefits must be incidental.

The **Charity Commission** has a large amount of guidance concerning the roles and responsibilities of charity trustees, and the changes to charity governing documents and conflicts of interest which require the Commission's authorisation, on their website.

Key documents that may provide helpful starting points are:

- **Registering an exempt charity**
- **Risks and how to manage them**

Exempt Charities: Frequently Asked Questions

Q: What is an exempt charity?

A: These are institutions which are not registered with or regulated by the Commission; they are regulated by a Principal Regulator.

Q: What is the role of the Principal Regulator?

A: Principal regulators are appointed under the terms of the Charities Act 2011 to promote compliance by charity trustees of exempt charities with their responsibilities under charity law. The Secretary of State for Education is the Principal Regulator of academies, free schools, voluntary and foundation schools and sixth form colleges. These institutions became exempt charities on 1 August 2011.

Q: How will the Memorandum of Understanding work in practice?

A: The Memorandum of Understanding is between the DfE and the Commission. It sets out each party's respective powers and duties in relation to academies, voluntary and foundation and sixth form colleges. It also sets out how DfE and the Commission will work together (in general terms), and key points of contact for different regulatory issues such as policy, legal framework, individual cases and investigation/statutory action.

Q: Do trustees and members of the governing body of an exempt charity have different responsibilities?

A: Trustees will continue to have the same general duties as Trustees of other charities. Trustees and governors should continue to publish the required information as set out in their Memorandum and Articles of Association and Funding Agreement for academies; their Instruments and Articles of Government for sixth form colleges and; Local Government audit arrangements for voluntary and foundation schools.

Q: Do exempt charities need to produce accounts, an annual report and an annual return?

A: Whilst exempt charities are not required to comply with the Charities Act 2011 to produce these documents, they may be required to produce them, and/or other financial documentation under their own legal framework or Principal Regulator requirements, for example:

- All academies are required to produce accounts and an annual report in accordance with the Companies Act 2006 and the Commission's Statement of Recommended Practice as if the Academy was a non- exempt charity.
- Sixth form college corporations are required to keep proper accounts and proper records in relation to the accounts and each financial year to prepare and submit audited financial statements, and other reporting in line with their Funding Agreement.
- Voluntary and foundation schools must comply with the Local Government audit arrangements.

Exempt charities must:

- Keep proper accounting records;
- Prepare consecutive statements of account consisting of an income and expenditure account and a balance sheet relating to the end of the accounting period; and
- Keep these records and statements for at least 6 years unless the charity ceases to exist and the Commission gives written consent.

An exempt charity must also provide a copy of its most recent accounts to anyone who makes a written request, within 2 months. Those that are companies operating under company law must publish their accounts in accordance with the Companies Act 2006.

Q: What role will the Commission continue to have in relation to these exempt charities?

A: The Commission retains responsibility, in consultation with the Secretary of State as Principal Regulator, for:

- advising charities and the Principal Regulator on compliance with charity law;
- authorising any actions for which a charity needs its permission;
- investigating any serious breach of charity law (at the invitation of the Principal Regulator);
- using its powers to protect charity assets and beneficiaries, where necessary and proportionate.

Q: How will any conflicts of interest between the Secretary of State's roles of funder and regulator be dealt with?

A: Both the Commission and the Cabinet Office are satisfied that the appointment of the Secretary of State for Education would not give rise to an inherent conflict of interest. To avoid potential conflicts of interest and ensure that, as the Principal Regulator, the Secretary of State for Education would be able to maintain the integrity of charitable status:

- the Secretary of State has agreed a Memorandum of Understanding with the Commission and the Education Funding Agency, setting out their respective roles, how all parties will work together and the circumstances in which the Secretary of State would refer issues to the Charity Commission. The Memorandum also commits all parties to reviewing from time to time how this relationship is working; and

- the Secretary of State will include in his annual report to Parliament a section on how he has carried out his principal regulator duties.

Q: What role does the Principal Regulator play if an exempt charity is alleged to be not complying with Charity Law?

A: Where cases of alleged non-compliance are brought to the attention of the Principal Regulator, the Regulator will be expected to undertake informal follow-up, initially to establish the facts. We envisage there may be cases of unintentional non-compliance that can be resolved at DfE and governing body level. However, a Principal Regulator is able to escalate cases to the Commission for further investigation, if the evidence suggests more serious concerns. The Charity Commission, if serious non-compliance is found, has the necessary enforcement powers to deal with any cases of serious non-compliance.

Q: What causes the Principal Regulator to look into an exempt charity within their remit?

A: Possible trigger points that could require investigation and possible sanctions are:

- a Charity undertaking activities that do not further its charitable purposes;
- evidence of unmanaged conflicts of interest or unauthorised trustee or connected person benefits;
- improper financial relationships between the charity and any non-charitable trading activities; or
- other evidence of breach of trust or breach of duty by a trustee or trustees.

Q: What are the Secretary of State's statutory and non-statutory powers that are most relevant to his role as Principal Regulator?

A: The Secretary of State has a wide range of powers (both statutory and non-statutory). The powers that are listed below are most relevant to the Principal Regulator role;

In relation to foundation and voluntary schools

Under sections 496 and 497 of the Education Act 1996, the Secretary of State may issue a direction to a governing body about the performance of any duty imposed on it under the Education Acts, if he is satisfied that it has acted or is proposing to act unreasonably in respect of any such duty, or has failed to discharge any such duty, in respect of complaints about the school made by a parent or pupil.

Under Part 4 of the Education and Inspections Act 2006, both local authorities and the Secretary of State have powers to intervene in schools causing concern. In particular, under section 69 of the Act, the Secretary of State may replace the governing body of a school eligible for intervention with an Interim Executive Board consisting of members appointed by him.

Where land held by the governing bodies of foundation schools was previously owned by a local authority and transferred without payment, the Education Acts give both local authorities and the Secretary of State a continuing interest in such “publicly funded” land. Similarly, land held by the trusts of foundation and voluntary schools may have been wholly publicly funded, or significantly enhanced at public expense, so that it meets the Education Acts’ definition of “publicly funded” land. This also applies to land held by an Academy Trust.

The disposal or change of use of publicly funded land requires the consent of the Secretary of State, and he may instead direct that it should be transferred to an Academy or Free School (with appropriate compensation for any private interest in the land). However, Ministers have taken a policy decision that in general we will not exercise these powers over trust land unless the public investment in the land is greater than 50%, or where the land or proceeds of sale are to be used for other charitable purposes of the trust where these are wider than educational.

Academy trusts

Full details of the Secretary of State’s powers are set out in the Articles of Association and the Funding Agreement (contract) for each Academy. This includes the power to terminate the Funding Agreement in certain circumstances, or if the Academy does not fulfil specific requirements.

If an Academy is in breach of its Funding Agreement, one option is for the Secretary of State to seek to enforce the terms of the contract through the courts.

It is more usual however, given the nature of the complaints received to date, for the Secretary of State to ask Academies to take certain steps (for example, to review a policy with a view to making sure it is compliant) or to ask them to review a particular decision. Solutions are normally reached by agreement with no need to resort to formal action under the Funding Agreement or court proceedings.

Sixth form colleges

Sixth form colleges are governed by their own Instruments and Articles of Government. The Education Act 2011 gives sixth form college corporations sole power to modify or replace their Instruments and Articles themselves providing the revised Instruments and Articles still meet the minimum standards set out in schedule 4 of the Further and Higher Education Act 1992.

The Instruments and Articles of Government for sixth form colleges set out the powers which the sixth form college corporation may exercise in furtherance of its charitable

object; and regulate the appointment, conduct and removal of members and governors, the frequency and conduct of meetings and how conflicts of interest shall be dealt with.

The Education Act 2011 confers all intervention powers for sixth form colleges on the Secretary of State. If the exercise of intervention powers is deemed necessary in a sixth form college, the Education Funding Agency and the local authority will work closely together to ensure that appropriate advice is provided to the Secretary of State.

Q: How will Academies be regulated in practice and what is the role of the Education Funding Agency (EFA)

A: The EFA supports the Secretary of State as Principal Regulator by:

- **Promoting compliance with charity law.** The EFA will provide links to relevant charity law and guidance on the Charity Commission's website (for example, on being a trustee and on protecting charities from harm) and to other good practice.
- **Monitoring the performance of academies.** This will include reviewing academies' financial health and financial management self-assessments, intervening in the event of poor financial performance or in instances of ineffective or improper governance, and ensuring that Academies' assets are only used to further their charitable object.
- **Reporting the performance of Academies on compliance to the Secretary of State for Education.** The Secretary of State for Education will include a section on how he has discharged his Principal Regulator duties in his annual report to Parliament on Academies.

Q: Do exempt charities still need to consult the Charity Commission if they want to make changes to their Memorandum and Articles of Association?

A: Academy Trusts that wish to make changes to their memorandum and articles, should consider a) whether their funding agreements require them to seek the Secretary of State's approval before doing so (academies that opened prior to January 2013) and b) whether the amendments are amendments regulated by S198 of the Charities Act 2011:

- a) an amendment of the company's articles of association adding, removing or altering a statement of the company's objects;
- b) any alteration of any provision of its articles of association directing the application of property of the company on its dissolution, and
- c) any alteration of any provision of its articles of association where the alteration would provide authorisation for any benefit to be obtained by directors or members of the company or persons connected with them.

These amendments must always be authorised by the Commission. Failure to apply for authorisation via the online form on its website will invalidate any amendments made.

Q: Are academy trustees required to consult the Charity Commission before making changes to their Endowment Fund?

A: Yes academy trustees must apply directly to the Commission, using the online form on their website, for its consent to make changes to their Endowment Fund. They no longer need to inform the Department or the EFA.

In January 2012 the Young Peoples Learning Agency wrote to sponsors and trustees of open Academies to advise them that Ministers had agreed to remove the requirement for sponsors to establish endowment funds, and it would not therefore take any action to enforce existing deeds of gift. However, the principal sum of an Endowment (permanent endowment) is restricted and the model deed does not allow it to be spent; only the income from the investment may be spent without the consent of the Commission.

There are powers under the Charities Act 1993 (as amended by the Charities Act 2006), which allow trustees to release the restriction on capital, and there may be instances when the Commission may be able to authorise a specific expenditure on terms of repayment or recoupment, meaning the Endowment would be preserved in the longer term, but trustees must obtain the consent of the Commission before doing so. Before exercising its powers to authorise changes to endowments, the Commission will consult the DfE, as Principal Regulator, but the DfE is likely to treat this consultation as a formality.

It is important for trustees to note that in all cases the decision to make changes to an academy endowment fund is their own, and must be taken in the interests of the endowment's beneficiaries and not in the interests of a sponsor.

Further guidance on this issue may be obtained from the [Commission's website](#).

Q: How are cases of serious concern dealt with at exempt charities?

A: Where either the Commission or DfE identifies potentially serious concerns about the administration of a relevant charity, it will notify the other in writing as soon as possible, setting out any charity law issues it has identified.

A notification from DfE to the Commission may invite it to use any of its regulatory powers or indicate that those powers may be required at some stage during the conduct of the case. In such cases, the DfE will supply the Commission with all information that is relevant and appropriate in the circumstances.

Q: Who should I contact if I have a concern about an exempt charity?

A: If you have concerns about the Principal Regulator role for a foundation or voluntary school contact the Department at pcu.correspondence@education.gsi.gov.uk

If you have general concerns about academies or sixth form colleges, including concerns about the Principal Regulator role you should contact the [Education Funding Agency \(EFA\)](#).

Q: As exempt charities aren't listed on the Charity Commission's website how can I prove my charity is genuine?

A: If exempt charities claim tax relief from [Her Majesty's Revenue and Customs](#) (HMRC) they will have been issued with an HMRC charity number and this can be used as evidence of charitable status. Information should also be available on a Principal Regulator's website about the institutions they regulate.

Further sources of information

Associated resources (external links)

The Charity Commission aims to increase public trust and confidence in charities. It produces guidance and advice which explains how exempt charities are regulated in England and Wales. Trustees may wish want to familiarise themselves with the [Commission's website](#).

- [Guidance for academies on their regulation as charities](#)
- [Guidance on the responsibilities of charity trustees](#)
- [Guidance on Exempt Charities](#)
- [Guidance on internal financial controls for charities](#)
- [Code of governance for the voluntary and community sector](#)
- [Guidance on codes of conduct produced by Charity Trustees Network](#)
- [Guidance by Companies House](#)

Principal Regulator appointments are made under the Charities Act 2006 now consolidated into the Charities Act 2011.

- [The Charities Act 2006](#)
- [The Charities Act 2006 \(Changes in Exempt Charities\) Order 2011](#)
- [The Charities Act 2006 \(Principal Regulators of Exempt Charities\) Regulations 2011](#)
- [The Charities Act 2011](#)
- [The Companies Act 2006](#)

Other departmental advice and guidance you may be interested in

The EFA produces guidance on its intervention in sixth form colleges and how sixth form colleges should report on their finances: [guidance for academies](#).



Department
for Education

© Crown copyright 2014

You may re-use this document/publication (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence v2.0. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/version/2 or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at: www.education.gov.uk/contactus.

Reference: DFE-00042-2014