This note is designed to provide information for academy trusts involved in an academy transfer and/or trust closure. It does not constitute legal advice and trusts should seek independent legal advice where needed.

Handling finances and liabilities in academy transfer and trust closure

1. An academy transfer is when an academy moves from the trust it is currently in ('the outgoing trust') to another trust ('the incoming trust'). In rare cases, all academies may be transferred out of the outgoing trust and then the trust closed. Outgoing and incoming trusts and their solicitors should note that the handling of academy finances and liabilities in a trust-to-trust academy transfer is not the same as in the conversion of a Local Authority maintained school into an academy.

2. The Department for Education (DfE) and the Education and Skills Funding Agency (ESFA) support the transfer/closure process to be followed by the outgoing and incoming trusts. These situations can be complex, so if the outgoing trust has concerns about its capacity to fulfil the requirements of the process, this should be discussed with the DfE and the ESFA at the start.

3. The transfer of academies to new trusts due to outgoing trust failure is a very rare circumstance. The overwhelming majority of academies are stable and financially compliant, with fewer than 2% subject to a Financial Notice to Improve on average. We will intervene where necessary when failures are identified; however only 3.3% of academies moved to a new trust in the financial year 2017 to 2018.

A deficit or surplus?

4. In an academy transfer due diligence is a vital part of the process, and this should clearly identify the current and projected financial position at the academy. In trust closures, the outgoing trust must quickly and robustly establish academy and trust level positions, projections and liabilities. Common liabilities at school and trust level relate to land and leases, contracts, grants, capital and building condition issues, staff and pensions among others. These should be identified through due diligence and any updated information at the point of agreeing the transfer documentation.

5. The incoming trust uses their due diligence findings to consider the minimum level of transfer funding that is required to support the transfer process, aligned to the fixed rate tariff. The DfE and the ESFA will take into account the particular circumstances of the academy and the incoming trust when assessing funding

requests on a case-by-case basis. Funding is not guaranteed, and if approved, may be lower than the original amount requested. Where transfer is on a voluntary basis, the DfE does not expect to make any contribution.

6. The outgoing trust must handle school and trust-level finances in accordance with the conditions set out in the Academies Financial Handbook, Articles of Association, funding agreement and any agreement with the incoming trust and ESFA, whether the transfer is for one or more academies, or a trust closure. The outgoing trust should seek their own legal advice on this.

7. The DfE and the ESFA would ordinarily expect that in an academy transfer, **any surplus of GAG or other public funding at the academy at the point of transfer would go to the incoming trust with the school. Any deficit at the academy at the point of transfer would ordinarily remain with the outgoing trust.** Restricted funds, such as donations for a specific purpose, must be used for the purpose for which they were provided; if those funds were provided for a specific use by the school they would need to transfer with the school. Private unrestricted donations to the trust for general use may be retained by the outgoing trust. We would expect the outgoing trust to discuss with the DfE and the ESFA first if they were considering any divergence from this approach. The trust's accounts must clearly differentiate between restricted and unrestricted in line with the ESFA Accounts Direction.

8. Some academies may not be operating a balanced budget and forecasting in year deficits which would result in the school generating a deficit going forward from the point of transfer. This would apply even in a zero balance transfer, where any cumulative deficit at the point of transfer remains with the outgoing trust. In such cases, we expect the incoming trust to develop a viable plan for returning the academy to an in-year surplus within a time period stipulated by the ESFA. This is often likely to involve considering how to manage funding across the trust, increase pupil numbers and ensure the staffing at the academy is appropriate and carrying out measures such as Integrated Curriculum and Financial Planning. Further information on this is published on our website here and here. The ESFA does not expect trusts to require additional financial support, other than the fixed rate tariff or any capital funding, as a consequence of taking on an academy.

9. Where trusts close, this can be by a process of solvent or insolvent wind-up. A solvent wind-up is where all residual liabilities at the point of wind-up can be met from trust funds. An insolvent wind-up may happen where the trust has insufficient funds to cover all of its liabilities, and needs to work with an administrator or enter voluntary or compulsory liquidation.

What happens to any deficit or surplus if the outgoing trust is closing and there is to be a solvent wind-up?

10. In those rare cases where the outgoing trust is transferring all its schools and closing, we will work with both the outgoing and incoming trust(s) to explore the most appropriate option for handling of the financial position. This may include one or more of the following approaches:
    a. The outgoing trust taking a trust-wide view of the financial position of the trust core and all its schools. This could result in **all surpluses of GAG and unrestricted funding and deficits being handled at trust-level, and transferring each school with a 'zero balance', i.e. without any surplus or deficit at the point of transfer.** This is sometimes referred to as **'a balanced budget approach'.** The Academies Financial Handbook and model Funding Agreement enable this approach, as long as funds that remain in the outgoing trust are distributed in accordance with the trust's Articles of Association and agreed with the ESFA in advance;
    b. A risk sharing approach, whereby the incoming trust accepts that they will support both the financial and educational recovery of the academy. This can mean that some or all of any cumulative school level deficit would transfer with the school. The ESFA will work with a trust to ensure the outcomes for pupils are protected and the best interests of the taxpayer are served.
    c. Any surplus held at school level transfers with the school to the incoming trust.

11. The ESFA will consider any school improvement strategy alongside the financial position of the incoming trust, the assets of the schools being transferred, and the capacity for the incoming trust to effect improvement, both financially and educationally.

12. The agreed approach will help to manage the impact of trust closure for a range of people who could potentially be affected, as well as previous trust core staff to protect pension entitlements.

13. If a trust has any overall surplus at the point of wind-up, after all liabilities including for Local Government Pension Scheme (LGPS) and Teachers' Pension Scheme are met, the outgoing trust must agree with the DfE and ESFA how this will be handled. We are clear that no trustees should benefit from any surplus, which must be distributed in accordance with the Articles of Association, and in the interests of supporting the pupils and academies.

14. If a trust enters into an insolvent liquidation during the process of wind-up, the hierarchy of liabilities provided by the Insolvency Act 1986 will apply.

15. Our expectation is that any 'non-grant income' generated by the academy will always transfer with that academy. Non-grant income refers to any funds that have originated from a source other than the Government, for example through parental contributions to school trips, or donations to PTA funds as such funding must be used in accordance on terms upon which it was donated. Unrestricted non-grant income , such as private donations to the trust (as opposed to academy), can remain with the outgoing trust. Some grant income may also be expected to transfer to the new trust even if the trust is operating a balanced budget approach to the transfer.

What else does an outgoing trust have to do to help achieve a solvent wind-up and minimise impacts for public money?

16. To support a solvent wind-up, alongside the surplus/deficit handling approach agreed with the ESFA, the outgoing trust must closely control and reduce its expenditure. The outgoing trust is responsible for:
    - planning and taking all appropriate measures to scrutinise and reduce expenditure across the trust
    - providing monthly updates to the ESFA on the financial position of the trust, to show the current position and projected position at the point of closure, and an updated balance sheet
    - seeking advance approval from the ESFA for any expenditure above a certain threshold, to be determined by the ESFA dependent upon the circumstances of the trust
    - identifying all of its current and historic liabilities and disclosing these to the DfE and the ESFA
    - identifying all current and historic academy-level liabilities, and disclosing these to the incoming trust during the due diligence phase
    - suitably, lawfully disposing of commitments that are no longer needed due to the planned trust closure. For example, using a break clause to exit a lease for head office premises early. Trusts can seek expert advice on this from the [Buying Hubs](#)
    - managing the implications for staff including fulfilling of TUPE responsibilities and any resulting redundancies, and, in the case of non-voluntary transfers, potentially supporting core staff members to find redeployment
    - agreeing with the incoming trust(s) how risk and liabilities will be shared
    - other appropriate measures specific to the circumstances of the case.

17. In some cases, it may be necessary to introduce additional skills and expertise at board and/or executive level to drive through an efficient closure. Outgoing trusts may identify skills gaps themselves, through a governance self-assessment, or the DfE may identify these gaps. This may involve working with

Academy Ambassadors, who provide a free service to trusts matching them with business people looking to improve the level of professional skills at board level. Since 2013, this programme has made over 800 introductions to trust boards.

18. The ESFA has been piloting a phased programme of work to deploy School Resource Management Advisers, who provide tailored support and guidance to help trusts maximise the use of their resources in order to improve outcomes for pupils in a financially sustainable way. They use data and benchmarking to help schools understand their position, and how it compares to that of schools which are similar in characteristics and challenges. They also help school leaders establish the analysis and tools that will most help them in improving their school's resource management. Where appropriate, especially when working with MATs, the School Resource Management Adviser will help the trust to develop an approach to planning that combines curriculum and financial planning into a joint, data-informed exercise.

19. In most cases, if school-level budgets are already agreed for the current or imminent academic year, any expenditure should be protected in the interests of the pupils and staff, and the outgoing trust should ensure the schools do not overspend.

20. The ESFA will require the trust to provide assurance and evidence of effective financial controls throughout the transfer/closure process. As well as continuing to adhere to the Funding Agreement and the Academies Financial Handbook, the outgoing trust must adhere to any conditions put in place by the ESFA, including through any Financial Notice to Improve or through specific agreements relating to the wind-up. For example, the ESFA may require the outgoing trust to submit monthly management accounts.The outgoing trust must immediately notify the ESFA of any cash flow issues arising during the transfer and wind-up process and how they intend to manage these.

What happens to other liabilities in academy transfer and trust closure?

21. In any academy transfer, there must be risk sharing between the outgoing and incoming trusts. Similar to transfers of this nature outside of the education sector, all liabilities should sit with the incoming organisation. The exact balance of risk between the outgoing and incoming trusts is to be agreed between the two trusts, taking into account the specific circumstances of the case. This must be set out in the Commercial Transfer Agreement that both trusts must agree and sign once approved by the DfE. The principle of risk sharing also carries over to the Deed of Novation and Variation that both trusts

and the Department must agree and sign to novate the academy Funding Agreement and any residual rights and liabilities contained therein to the incoming trust.

22. We expect that current and historic liabilities relating to the academy would transfer with the academy to the incoming trust, with the outgoing trust indemnifying the incoming trust for any unknown liabilities relating to the pre-transfer period that may only materialise post-transfer. Whereas current and historic liabilities relating to the outgoing trust core, and clearly not connected to any one of the schools, would remain with the outgoing trust. When the outgoing trust is closing, this indemnity may not provide sufficient assurance to the incoming trust. If that is the case, the incoming trust should contact the ESFA to discuss its concerns.

23. Before the schools transfer, the outgoing and incoming trusts will agree and finalise apportionment of certain liabilities and costs. Whether a liability is to be taken by the outgoing or incoming trust depends on when the liability is attributable. Those liabilities attributed to a date before the date of transfer would generally be expected to lie with the outgoing trust; those attributed to the date of transfer or after would generally be expected to lie with the incoming trust, for example, where the benefit will confer on the incoming trust. The precise methodology for apportionment must be agreed by both trusts and be in line with the terms of the commercial transfer agreement. The implementation of the agreement on apportionment will take place after transfer.

24. If the zero balance approach is agreed as the overarching financial handling strategy, the outgoing trust will need to accrue, provide and make assumptions in order to reach its projected final closing balance of each academy prior to transfer, in order to quantify the amount of surplus or deficit to be retained at trust level.

25. The incoming trust will need to facilitate access to the academy’s records to the outgoing trust and its auditors post-transfer, to enable them to fulfil their statutory obligations in relation to their accounting. This could result in a final adjustment to the outgoing trust’s closing balance, but should not affect the incoming trust’s financial position.

26. The outgoing trustees will need to make arrangements to retain records for the appropriate length of time in accordance with Charity Commission requirements.

27. The Academies Financial Handbook section 2.3.11 sets out the requirement that all trusts should consider opting into the Risk Protection Assurance scheme, or alternatively take out a commercial insurance policy to cover as a

minimum buildings and contents, business continuity, trustee, employers' and public liability insurance and any cover required for motor vehicles. Personal liability claims against a trustee can arise as a result of negligence, default, breach of duty or breach of trust. The cover arranged should secure best value for money.

28. Outgoing trusts will need to refer to paragraph 8.9 of the Accounts Direction, which deals with how to account for transfers, inactivity and combinations. Both incoming and outgoing trusts will need to work together to produce the financial statements and accounts return of the outgoing (inactive) academy trust. Inactive academy trusts are still required to produce and submit their accounts, and accounts return, for the year in which the academy trust became inactive. These should be prepared as soon as practicable and submitted to ESFA. Financial statements should be submitted to ESFA no later than four months after the date to which the financial statements are prepared. **In any event, the accounting period end date must be no later than the following 31 August and audited financial statements must be submitted to ESFA by 31 December**.

What happens to Local Government Pension Scheme (LGPS) liabilities?

29. Any non-teaching staff employed in academies or trusts are likely to be eligible to participate in the LGPS. It is vital that these entitlements are protected during academy transfer and trust closure. The transfer of an academy from one trust to another is essentially a simple change of employer – from outgoing trust to incoming trust. As part of the transfer, all pension liabilities and assets relating to current and former employees at the academy will transfer to the new trust.

30. Pension liabilities in respect of staff who used to work at the school when it was local authority maintained, but who never worked at the academy, are **not** included in the academy liabilities. The liabilities remain with the local authority, as they have done since the original conversion from local authority maintained school to academy status. Pension liabilities for any active, deferred or pensioner member of staff employed by the outgoing trust, but not directly connected to an individual school will remain with the outgoing trust.

31. The outgoing trust has been responsible for paying off the academy related liabilities, including LGPS pension deficit, over time from its GAG. The incoming trust will be receiving the same GAG and will continue to pay off the LGPS deficit. The transfer/closure should not result in any change to the LGPS employer contribution rate. LGPS deficit liabilities are offset by the level of LGPS fund assets attributed to the ex-employees in question. If any of those liabilities are not transferred to the incoming trust the level of underlying fund assets transferred

will be reduced commensurately. This would result in increased employer contributions.

32. The effect of not accepting the pension liabilities relating to former academy employees would be that the liabilities will 'crystallise' and require a lump-sum payment to be made to the fund. The lump sum payment would be substantially more than paying the deficit down on an ongoing basis.

33. If the outgoing trust is closing, it must meet any LGPS liabilities that remain with it. If all the trust's assets have been used, the trust can apply to the DfE's Department Guarantee for the DfE to consider meeting any outstanding LGPS liabilities.

If you have queries about the process please discuss this with the dedicated leads for your case in the DfE, usually in the Regional Schools Commissioner's team, and the ESFA.

If you have feedback about this information note please contact: academy.questions@education.gov.uk