NATIONAL HOUSING FEDERATION

Mergers, Group Structures and Partnerships

A voluntary code for housing associations



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- Margaret Allen
- Katrina Laud

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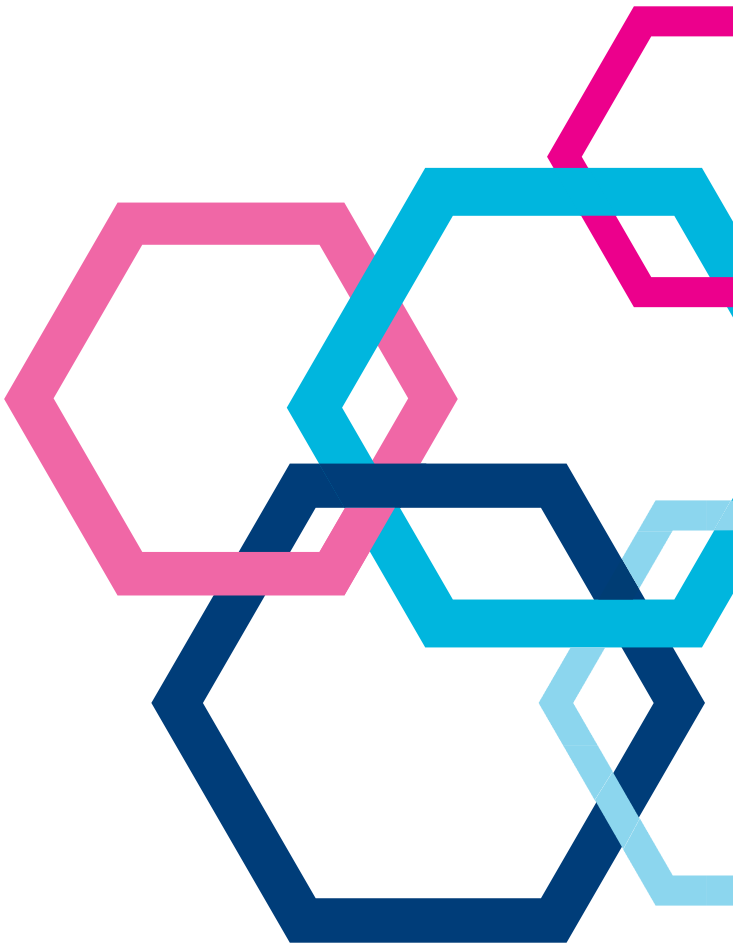
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Foreword

Housing associations are a success story. We are effective businesses whether we operate as charities or not-for profit companies and we have remained effective because we adapt to the changing environment whilst maintaining our core mission. But we are under continuous scrutiny. Our efficiency and effectiveness as a sector has been challenged and there are some who believe that the sector is not prepared to push itself to secure value for money or sweat its assets to enable more homes to be built.

We must, of course, counter these views with the sector's many success stories, with the countless examples of good practice, efficiency and ambition. But we must also examine ourselves to see where we can improve. In order for us to remain a credible, independent sector, we have to demonstrate that we take these views seriously and are prepared to meet them head on.

Our 2015 Code of Governance makes it a core function of the board to ensure that the organisation 'operates effectively, efficiently and economically'. This Code for housing association mergers, group structures and partnerships has been written for organisations and may help them achieve that aim in those cases where the board has decided that a merger, group structure or other partnership is the best way for achieving it. Organisations can adopt it, on a voluntary basis, and use it as a framework for the strategic discussions around efficiency that all organisations will be having. It sets out clear principles for boards and the executive to consider when they explore the questions of merger, group structure or partnership opportunities. This sits alongside other work we are doing on collaboration, shared services and helping associations operate effectively and efficiency.

It is not prescriptive and it does not seek to influence the outcome of dialogue on mergers or other forms of partnership. Indeed, for some organisations the code will help the board decide that a merger is not the right option for that association. We recognise all organisations are different. But if organisations adhere to the 10 core principles, they will demonstrate to themselves and stakeholders that they embrace the efficiency agenda, are acting in the best interest of the organisation, and are serious about protecting the legacy of the organisation.

David Orr
Chief Executive
National Housing Federation



Introduction

This voluntary Code sits alongside a suite of relevant law, regulatory requirements and other codes supporting excellence in governance in the housing association sector.

Whilst the Code holds voluntary status, many of the principles within it are embedded in relevant law, other codes of practice, codes of governance and regulatory guidance or regulatory standards. Organisations using this Code should ensure that they have considered and comply with such law or regulation.

All housing association registered providers must comply with the Homes and Communities Agency's published Regulatory Framework – including the standards in governance, viability, and VFM. The latter includes specifically the requirement for boards to undertake 'rigorous appraisal of all potential options for improving value for money including the potential benefits in alternative delivery models – measured against the organisation's purpose and objectives'. This Code also has a strong link to the Federation's Code of Governance – especially the provisions within section C1 which cover the essential functions of the board and chair.

This Code is framed to operate primarily in respect of proposals between housing associations rather than between a housing association and another type of organisation (e.g. care providers or charities). Whilst the majority of the Code principles may be relevant, where one of the parties is not a housing association, other considerations/ guidelines may be applicable.

Adopting and complying with the Code does not suggest that all the needs of regulatory bodies have been covered. It can however help demonstrate how an organisation has acted:

- in considering how it is placed to meet its long-term objectives
- in conducting its decision-making processes around potential partnerships, group structures and mergers
- in demonstrating compliance with aspects of codes of governance and the Regulatory Framework
- in demonstrating transparency and accountability to its beneficiaries around informed decision making on the delivery of its purpose.



Why introduce a voluntary code?

The Code is intended to support boards in their stewardship role; in applying sound principles in setting out their business purpose and in their evaluation of the options that optimise delivery for beneficiaries in the long term. The housing association sector is diverse in size and nature. The Code aims to establish a set of core principles to which any housing associations seeking, or exploring such dialogue should adhere. It offers a consistent framework to assist board ownership, support decision making, and to embed improved transparency and accountability.

Merger, group structure and partnership opportunities should be seen as part of any organisation's strategic discussions around how best to achieve its objectives and deliver for current and future tenants. In adopting a code on a voluntary basis, the sector is sending out a clear message that it understands the importance of the efficiency agenda and will consider all options available in a thought through and transparent way.

There will be many forms of merger, group structure and/or partnership and this Code seeks to provide a baseline for what good process and conduct looks like. The size or nature of partnership under consideration should not deter organisations from seeking to apply the principles of this Code, but in some instances (e.g. time-limited, project-specific partnerships), a degree of proportionality may be considered.

The Code seeks to provide a baseline rather than a ceiling, and adopters of the Code may choose to be bolder in their approach.



How to use this Code

This Code is voluntary. It is for each housing association to decide if it wishes to adopt the Code to inform its approach to mergers, group structures and the broader range of partnership models that may affect how the organisation will operate.

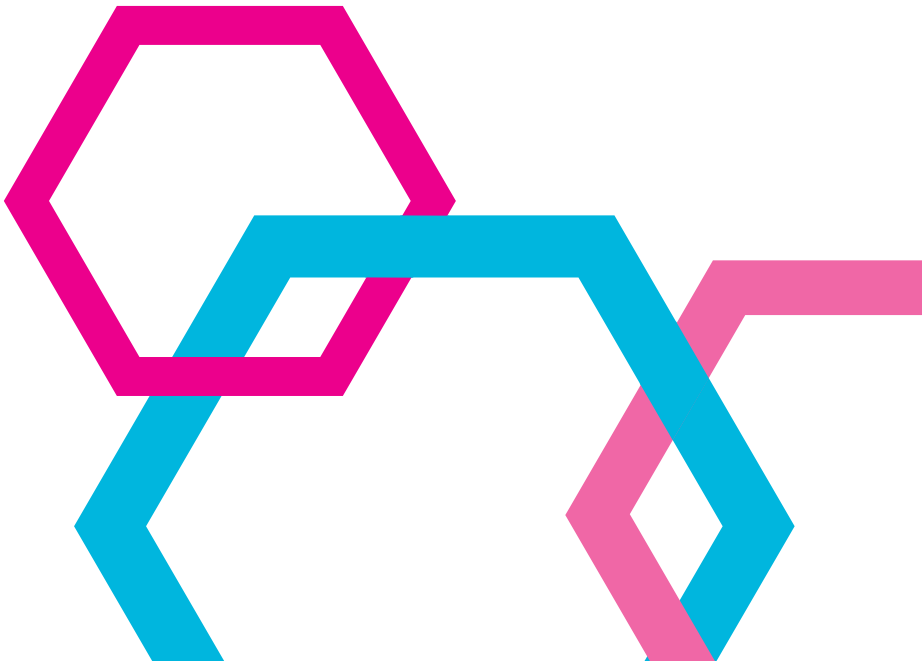
The focus of the Code is on the early stages in a partnership process. It covers the manner by which organisations consider and determine if merger, group structures and/or particular partnership options are in the interests of beneficiaries and should be fully and formally explored.

The Code does not prescribe processes nor does it seek to influence outcomes. Its focus is on conduct, informed judgements, transparency and accountability.

The Code comprises 10 general principles of conduct. Each principle relates to a stage in the decision-making process and is underpinned by a number of key provisions setting out how each principle should be applied. Attached to the Code are appendices that provide more information that can be used by boards to help them decide how best to apply the principles relative to their own circumstances. The appendices are not part of the Code.

A simplified process map is included at Appendix 1 which demonstrates how the Code might work if applied in practice. This includes suggested timelines for various stages in the process which are considered good practice and are suggested to help boards balance the time needed to make the right decision and the cost of extended processes.

Where adopted, associations are expected to comply and work to the spirit of the Code in its entirety, with an emphasis on openness, accountability and ensuring that each board has acted in the best interests of the organisation and its beneficiaries.



What we mean by mergers, group structures and the broader range of partnership models

Mergers can be achieved in a variety of ways, and the historic ways in which these have been achieved (through transfers of engagements, amalgamations and joining or forming group structures) remain merger staples. However new kinds of partnerships have emerged over recent years, such as strategic alliances and cost-sharing groups.

Transfer of engagements

This is a statutory process available to community benefit societies (CBSs). In essence the process transfers the whole of the business of one CBS into another. The process is effected by the shareholders of the transferring CBS resolving to transfer all assets and liabilities into another CBS. The receiving CBS can either pass a board or shareholder's resolution accepting the transfer.

One of the key benefits of this statutory process is that once these resolutions have been registered with the Financial Conduct Authority, all assets, rights and liabilities automatically vest in the receiving entity by operation of law and without the need for further formality. For property and asset owning entities like housing associations, this statutory process presents a very streamlined method of achieving a merger.

Whilst a transfer of engagements seems to suggest a takeover by one housing association of another, this is by no means the only reason why this statutory mechanism is used to achieve a merger, and there are often other valid reasons why the transfer of engagement route is chosen. An example of this is lender-related covenants. Depending on each housing association's specific covenants, a transfer of engagements can sometimes trigger fewer consent requirements, meaning that the cost of a merger is reduced. Even where the transfer of engagements route is chosen, the receiving entity can be re-structured and branded to reflect more of a merger of equals if that is what the parties intend.

In effect the transfer of engagements is simply chosen as the most cost-effective way of combining the entities rather than denoting a takeover.

Although it is technically possible for a housing association incorporated as a company to transfer its engagements to a CBS, or for a CBS to transfer its engagements into a company, the full benefits of the statutory process cannot be achieved unless both organisations are CBSs. For that reason, a merger involving a company will often involve a conversion of the company into a CBS as an initial step to merger. This applies equally to the amalgamation process mentioned below.

In addition to corporate status there are other issues that merging organisations may need to consider in order to prepare for a merger by way of a transfer of engagements. A key issue is that of charitable status. It is possible to bring together both charitable and non-charitable organisations as part of a merger, but it is essential that the merging organisations have undertaken appropriate due diligence on the two businesses in order to satisfy themselves that it is appropriate to bring the two businesses together. The essential question here is whether the non-charitable organisation is carrying out something that can be carried out by a charity. In some cases merging entities will undertake a pre-conversion of the non-charity into a charity prior to merger so that there is absolute certainty on this point. This applies equally to the amalgamation process mentioned on the next page.



Amalgamation

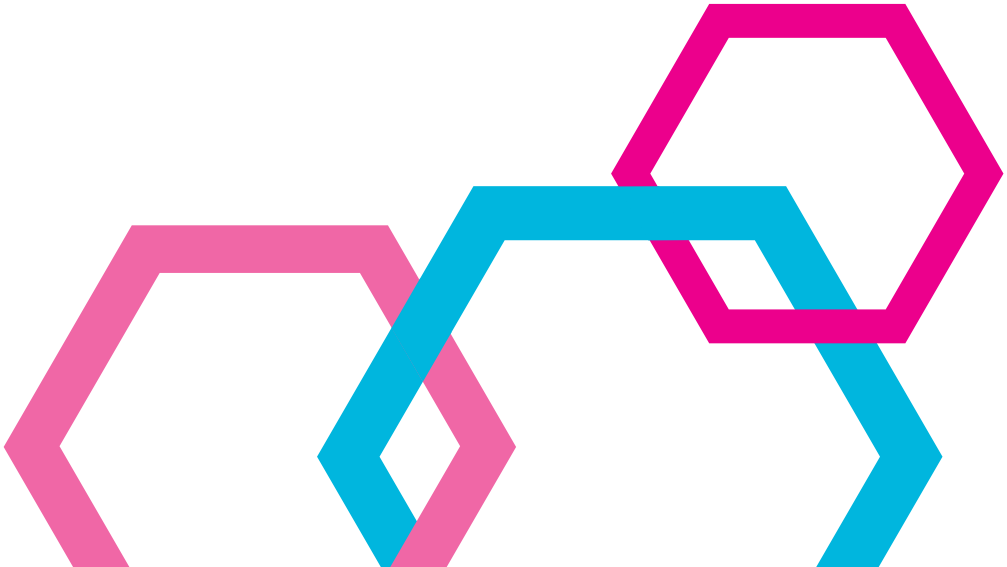
Like a transfer of engagements, an amalgamation is a statutory process also available to CBSs. Under this process one or more CBSs merge together to form one single body. This is effected by the shareholders of the amalgamating CBSs each resolving to amalgamate with one another.

The overall effect of a statutory amalgamation is not to create a "new" body, but to create a "combined" body into which the assets and liabilities of each of the amalgamating organisations are automatically vested. As with a transfer of engagements, once the resolutions to amalgamate are registered with the Financial Conduct Authority, all assets, rights and liabilities automatically vest in the amalgamated body by operation of law and without the need for further formality. Again, for property and asset owning entities like housing associations, this statutory process also presents a very streamlined method of achieving a merger.

The amalgamation process presents an alternative to a transfer of engagements and there are usually a number of key reasons why this route is chosen as opposed to the transfer of engagements route.

These include:

- The impact on pensions – an amalgamation can have a lesser impact on pension risk exposure than a transfer of engagements. A number of pension authorities and scheme trustees have accepted that an amalgamation does not have the effect of crystallising pension fund deficits in respect of the amalgamating entities or triggering the termination of pension admission agreements. This is in contrast to a transfer of engagements which can give rise to a pension debt payable by the transferring employer. Costs associated with pension deficits can be significant, in many cases so significant that the costs would be prohibitive to merger. Because an amalgamation can help to mitigate the impact on pensions, it is for that reason why amalgamation rather than transfer of engagements is often chosen to effect a merger.



Joining or forming group structures

The transfer of engagements and amalgamation routes have the effect of actually merging corporate entities together. However, for some merging parties, their preference is for the identity of each entity to remain in place, at least initially. This can be achieved by joining an existing group structure or creating a new group structure. Either a new parent entity can be formed or, where the merging parties are already part of an existing group structure, the existing groups can be brought together by merging the existing parent entities (usually by way of a transfer of engagements or amalgamation). There are other ways to achieve a group structure but historically these are the most common.

There are usually a number of key reasons why merging parties choose this route:

- It can have a lesser impact on loan covenants and pensions, thereby reducing the cost of the merger
- It is a useful route where the parties wish to retain their individual identities post-merger
- It can help to keep the activities of one merging party ring-fenced in a separate entity.

As the individual entities remain in existence after the merger, there are no automatic asset or property transfers and the staff of each entity will also remain employed by their current employer. If there is to be any restructure of staff and assets as part of the merger, this would be delivered manually given that there is no automatic vesting as there is on a transfer of engagements or amalgamation.



This group structure route is also often chosen where a smaller or single entity is joining an existing or larger group. The inclusion of an additional entity into an existing group structure can have a minimal impact on things such as staff, pensions and loan covenants and so presents a straightforward way of bringing merger partners together. From a purely constitutional perspective, this kind of grouping is achieved by the new subsidiary entity altering its rules/ articles in order to reflect its new subsidiary status.

Strategic alliance

Strategic alliance is a term which loosely describes a close working relationship between two organisations that remain constitutionally separate. A strategic alliance is usually a contractual arrangement under which two or more organisations agree to work together, share skills and services and generally support each other in what they do. A number of successful strategic alliances have been established over the last few years and those alliances have generated significant cost savings.

The usual characteristics of a strategic alliance (although these may vary from alliance to alliance) include:

- A strategic alliance agreement which sets out how the partners intend to work together.
- A shared board for the housing association partners with members jointly appointed to operate within approved Terms of Reference to oversee the activity within the scope of the contract. This helps to introduce cohesion between the housing association partners. It also enables the associations to tap into the expertise of each other at board level.
- Joint employment of staff, either executive staff, operational staff or both. This generates efficiency savings and enables the partners to share staff costs.

Because this is a largely contractual relationship, this kind of arrangement can have a minimal impact on loan covenants, staff, pensions and assets generally. It can, therefore, be relatively straightforward to achieve depending on the extent and nature of the relationship.

Cost-sharing groups

Cost-sharing groups enable housing associations to put in place partnerships which enable them to effectively share the cost of services on a VAT-efficient basis. Aside from the VAT savings, the efficiency savings arising out of the sharing of the services themselves can also generate significant savings. Given the benefits that can be derived from cost-sharing arrangements, the number of cost-sharing groups being established is increasing.

Essentially a cost-sharing group is a joint venture arrangement set up by two or more housing associations. It is not a merger in the traditional sense, as each association remains separate, but it is a form of partnership arrangement which the housing associations enter into in order to gain mutual benefit. The joint venture vehicle is responsible for providing services to its member housing associations.

A wide range of services can be shared, such as executive teams, operational staff, repairs and maintenance services, audit, gas servicing, housing management, etc. In fact almost every aspect of the association's business is capable of being shared under this kind of cost-sharing arrangement.

There are a number of ways in which cost-sharing groups can be structured, but they can be put in place with ease in many cases.

This kind of partnership option may be attractive to those who are not seeking a corporate merger, but who want to share services with other housing associations in order reduce their own cost base.

There is no limit to the number of housing associations that can form part of a cost-sharing group, and so it would be possible to establish a large group involving many housing associations, much like a large corporate group structure but without the constitutional link.



The Code

1 The role of the board is to act in the best interests of the organisation. The whole board remains accountable to its stakeholders for informed decision making in the best interests of the organisation and its beneficiaries.

- Board members are temporary guardians of their organisation, and should consider how best to sustain delivery of the business purpose, manage risk and maintain business resilience, preserve the long-term mission and protect the interests of current and future beneficiaries.
- There can be no presumption that a merged entity is in the best interests of the organisation. There is a presumption that boards will give serious consideration to merger opportunities and other partnerships or delivery models that could advance the future viability, strategic and operational outcomes of the organisation



2 A board should review its purpose and values statement regularly to consider if the intent is clear and specific enough to allow the board to determine how best to continue to fulfil its objectives. Boards should:

- Regularly (at least once every three years) consider the purpose statement and values that might influence or determine the merits of merger, group structures and partnership options. This may include operating area, client group, resource optimisation, development, service and investment expectations.
- Consider the development of outcome-based criteria that would apply in the event of merger/group structure or partnership approaches having regard to the needs of beneficiaries.
- Review their relative and ongoing capacity to deliver the intended outcomes for beneficiaries and how resources may be optimised.
- Consider their business agility to address future desired changes in structure or delivery models and any related action required. Boards should consider whether they have created the right conditions to control or manage delivery risks, including potential consent requirements and the key risks of reputational nature, in the event of any merger, group structure or partnership dialogue progressing.

3 Where merger, group structure or partnership opportunities emerge, the whole board should be informed promptly. The parties should agree a process and timeline for the consensual development of first stage proposals, in order that the respective boards may properly evaluate the opportunity and make an informed and timely decision.

- Merger/group structure or partnership proposals may be generated via collaborative dialogue between potential partners. The board should be informed of any such dialogue at the outset.
- Where initial dialogue is via the chief executive or a person acting on his/her authority, matters should be handled in an open and constructive manner.
- Where collaborative dialogue has not been practicable or achievable, the board of one organisation may communicate in writing with the chair and chief executive of the identified prospective partner giving advance notice of the intention to submit a first stage merger or partnership proposal. The latter should be submitted for the attention of the prospective partner board.
- Boards need sufficient time and information to reach a properly informed decision but should avoid unnecessary delay and disruption to business. Boards should mutually agree a timeline for crystallisation of the first stage proposal. An illustrative timeframe is suggested in Appendix 1.
- Irrespective of the route through which board consideration of an opportunity is generated, the parties must enter into a non disclosure agreement that protects the confidentiality of both organisations.
- Where a board receives written notice of an imminent proposal, it may seek other proposals for review within the same timeframe (as set out in Appendix 1 or as mutually agreed). It should maintain confidentiality and not disclose information on the identity of any prospective partner, but must confirm to each organisation the total number of merger/partnership proposals being sought or reviewed.



4 Decisions on merger, group structure or partnership proposals must be presented to and decided upon by the board(s). In considering any proposal, a board should have access to sufficient written information to reach an informed in principle decision to explore or reject merger/group structure/partnership dialogue. Information provided at the first stage should include a written proposal with enough material to allow the board to consider the overarching suggested intent of a combined business or partnership, and the perceived financial, strategic and tactical implications for their respective organisations.

- A first stage proposal should be written and must be considered by the board(s) who should take an in principle decision to proceed to further explore and test the opportunity or to reject the proposal(s).
- In order to be valid, first stage proposals should set out sufficient detail for the board(s) to form an opinion. This should include a headline vision for the partnership/combined entity, plus financial, strategic, and tactical information to allow the board(s) to recognise their organisation's future role, opportunities and constraints, and potential impacts for key stakeholder groups.
- Financial information should be based on the latest information in the public domain including current financial performance (both parties), and sufficient information to indicate the impact of combined financial resources on debt / borrowing capacity, cash flow, and potential joint capacity for investment programmes.
- In submitting first stage proposals a board should reveal any material current financial performance information where this differs from the position in the public domain.
- Strategic/tactical information should summarise potential benefits which might arise from merging including assumptions on current and future market positioning, potential capacity release, service impacts (including repairs) and future operating costs/efficiency gains.
- The first stage proposal should be explicit about any conditionality. It should summarise any requirements/expectations such as future operating area and/or use of locally generated operating surpluses.

5 Boards should ensure they have, or have access to the specific skills and experience necessary to objectively evaluate the merits or otherwise of merger, group structure and partnership proposals. Where the board does not have such specific skills it should seek impartial advice on the implications of the proposal.

- The extent and type of advice sought is a matter for each board to determine.
- Additional skills may be obtained either by co-option to the board, to a task and finish group to consider the partnership proposal or via an external resource.
- Where a task and finish group operates, board members should be in the majority, the group should operate within delegated authorities and the board must retain the decision-making role.
- Boards should consider how they will demonstrate transparency in the evaluation of, and decision making on, proposals in terms of optimising business objectives.



6 **No board member or member of the Executive should behave in a way which could frustrate due consideration of a first stage proposal by the whole board. This includes failure to present/discuss approaches with the board, dismissal of an offer without due consideration or withholding information that is integral to a decision.**

- In considering merger, group structure or partnership proposals, boards should consider how they have exercised their fiduciary duty in managing personal interests/conflicts of interest both for themselves and for management. The management of conflicts is further considered in Appendix 2.
- Boards should ensure that decision making is based on the business mission and free of potential personal interests.

7 The board's decision on a first stage proposal should be documented and communicated to the other party (parties) in writing.

- A date for response to the written 'first stage' proposal should be agreed at the outset. Any extension of this period should be through mutual board agreement.
- Boards should document the rationale for the decision to accept or reject propositions through a formal board report and minutes. Evidence of proper and rigorous analysis should be retained.
- Where propositions are rejected, the decision should be advised in writing with reasons for rejection which may include financial, strategic and tactical matters.

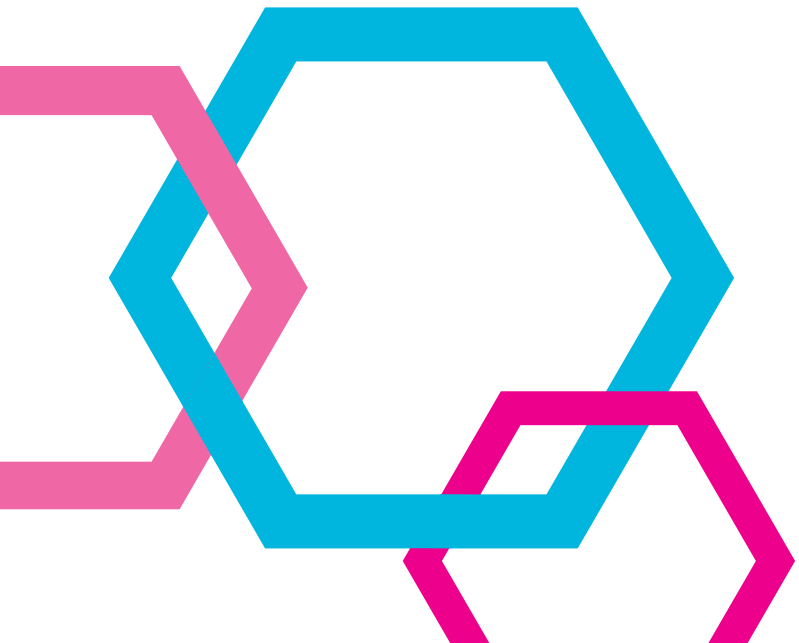
8 **Once a first stage proposal has been agreed in principle by the board, a process and timetable for next steps should be agreed in writing by both parties.**

- The process should include a standstill agreement, a longstop date, confidentiality undertaking, the intent of the parties/heads of agreement, and agreed parameters for due diligence.
- Both parties should agree on a formal exchange of information to enable an outline business case to be developed and due diligence to be undertaken. This will likely include information not in the public domain. This will allow original assumptions to be tested and determine if the opportunities presented by the proposal can be realised to enhance delivery of the respective business purposes in a combined organisation.



9 Following approval of the first stage proposal and intent to proceed, an outline business case should be prepared which will include disclosure of financial and non-financial undertakings and target efficiencies/undertakings to be realised as part of the merger proposal.

- Any business case must recognise the integrity and obligations of the sector, and will include:
  - consideration around reputational risk, the optimum structures and skills (both at board and leadership levels) to position the combined entity for successful delivery of the agreed mission
  - ensuring transparency and accountability for delivery of the target outcomes - including capacity release and any broader intended merger gains.

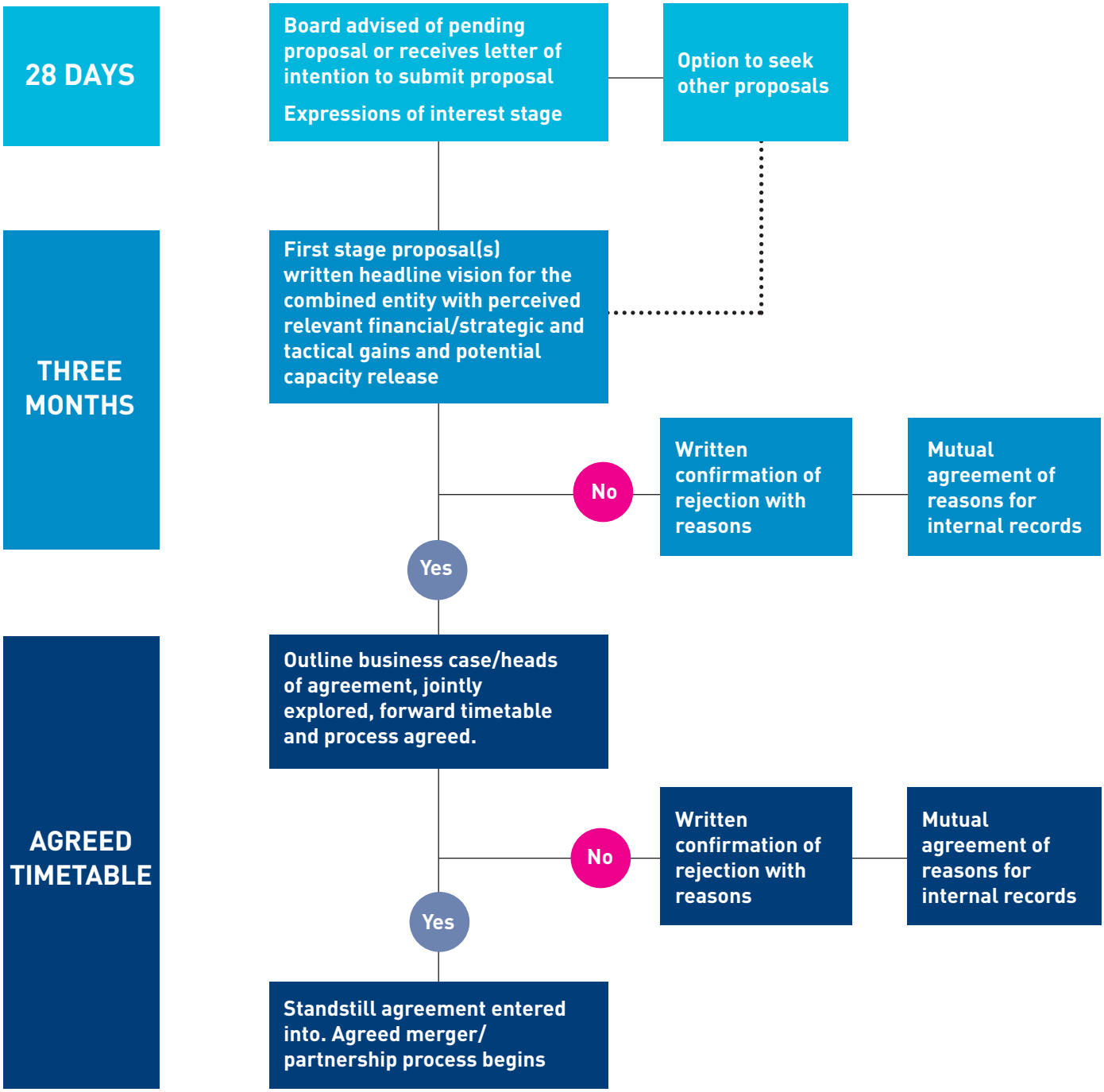


10 Once the code is adopted it is expected that boards will declare this each year in their financial statements, VFM self assessment or annual report and that they will, each year, keep a record of activity under the Code including any proposals reviewed or submitted along with the outcome of these.

- Where proposals have been rejected a record should be retained of how the decision was made and the reasons for rejection having regard to the business purpose.
- Boards should consider how best to achieve transparency of their activity under the Code, including options for summary reporting such as in the financial statements, annual report or VFM statement. As a minimum this should include sufficient information to indicate the volume and outcome of activity each year without disclosing parties involved or any commercial breaches.
- The record of decision making on any specific formal proposal is confidential to the board and as such boards can reserve the right to withhold this under commercial privilege.
- The decision on merger, group structure or partnership proposals rests with the boards of organisations. Where one party feels a board has declared they have adopted the Code but have not followed its principles, there is no appeals process within the Code.
- Departures from the Code do not of themselves constitute absolute breaches where there is robust evidence of proper consideration of how the principle informing the provision is observed through other means.

Appendix 1 – Illustrative process map

Note: This is an illustrative guide and not a formal part of the Code



Appendix 2 – Managing conflicts of interest

All board members have a duty to act in the best interest of their organisation at all times, and they are subject to specific duties in relation to conflicts of interest.

For board members of housing associations that are community benefit societies, they have a fiduciary duty: a board member must not place him/herself in a position where his/her own interests conflict with those of the organisation or where there is a real possibility that this will happen.

For board members of housing associations that are companies, their duty to avoid conflicts is set out in section 175 of the Companies Act 2006:

'A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company'.

In addition to these overarching legal duties, the issues of conflicts will often be referred to in housing association constitutions, including provisions which cover interests and benefits.

The Federation's Code of Governance also specifically covers the issue of conflicts and makes clear that board members must act with upmost prudence, avoiding conflicts at all times, and ensuring that these are properly managed and declared if they arise.

Beyond the above, conflicts are often covered in board member codes of conduct, conflict of interest policies, standing orders, board member service contracts etc, and so the obligation in relation to conflicts usually comes from a number of sources.

What does this mean within the context of merger, group structure and other forms of constitutional partnerships? On any decision relating to these, board members must act free from any other interest and must consider what is in the best interest of the organisation. This obligation runs from considering the change as part of the organisation's strategic thought process (see principle 2), to considering initial proposals (see principles 3 and 4) and then throughout the entire process of implementation.

As mentioned above, all board members have a duty to act in the best interest of their organisation at all times. What this means is that they must act in a way which best achieves the organisation's objectives. In most cases a housing association's objectives will be the provision of housing and associated facilities and amenities to those in need. Whilst considerations relating to local stakeholders (such as local authorities), executive staff, other third parties, may form part of the thought process, the overarching question is 'what will best achieve the organisation's objectives and obligations to service beneficiaries?' and not 'what will best protect the interests of those groups of people'.



NATIONAL HOUSING FEDERATION

The National Housing Federation is the voice of affordable housing in England. We believe that everyone should have the home they need at a price they can afford.

That's why we represent the work of housing associations and campaign for better housing. Our members provide two and a half million homes for more than five million people. And each year they invest in a diverse range of neighbourhood projects that help create strong, vibrant communities.

National Housing Federation
Lion Court, 25 Procter Street London WC1V 6NY
Tel: 020 7067 1010 Email: info@housing.org.uk

www.housing.org.uk

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