

AUDIT • TAX • ADVISORY

Can NDA's trump Charities' Disclosure requirements?

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The Issue

- A Non-disclosure Agreement (NDA) is signed as part of severance arrangement for staff within a charity,
- This effectively prohibits the charity from disclosing details of the settlement.
- Accounting Standards can require disclosures of certain aspects of such settlement agreements

What do we need to disclose?

Can we avoid it?

How can we avoid or resolve a clash?



Topics covered

1. What is a Non-Disclosure Agreements (NDA)?
2. Quick Recap on the disclosure requirements for Staff Remuneration and Trustees
3. Ex-gratia and severance payments
4. Related party disclosures (inc Key Management Personnel)
5. Audit issues
6. NDAs -v- Audit disclosure

Topic 1:

What is an NDA?



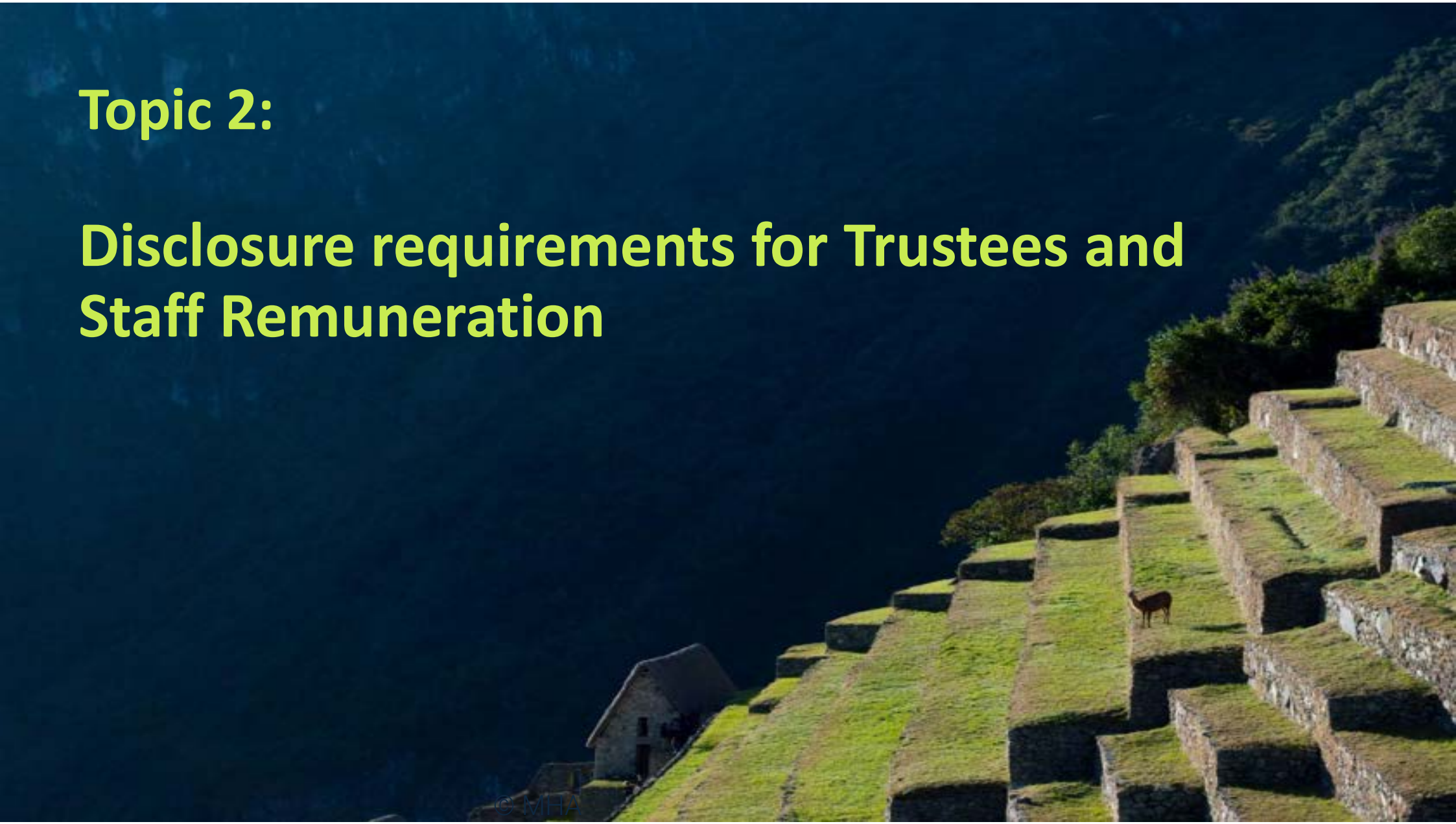


What is an NDA?

- Used where there is a need for confidentiality in transactions
- In employment context: Settlement Agreements.
- What are the benefits?
- What are the downsides?
- What are the reputational risks?

Topic 2:

Disclosure requirements for Trustees and Staff Remuneration



Worked Example – Arts Theatre Trust (expanded)

Example Trustees Annual Reports - SORP - CCEW (charitySORP.org)



12 Analysis of staff costs, trustee remuneration and expenses, and the cost of key management personnel

	2020 £'000	2019 £'000
Salaries and wages	699	672
Social security costs	53	51
Redundancy and termination costs	20	10
Pension costs	66	72
Total emoluments	838	805

No employees had employee benefits in excess of £60,000 (2019: nil). Pension costs are allocated to activities in proportion to the related staffing costs incurred and are wholly charged to unrestricted funds.

Included in the total emoluments figures above are payments amounting to £20k made to 2 members of staff (2019: £7k to 1 member of staff) on termination of employment, this includes ex-gratia compensation payments of £5k made to one employee (2019: £3k to one employee). These costs have been incurred as part of a programme of work to implement our strategy and ensure we have the right people with the right skills to meet the needs of our beneficiaries effectively. Where redundancy, termination and compensation payments were made, payments were based on service. These payments are managed by the Human Resources department in line with policy and procedures and authorised according to the scheme of delegation based on size of payment.

The charity trustees were not paid or received any other benefits from employment with the Trust or its subsidiary in the year (2019: £nil) neither were they reimbursed expenses during the year (2019: £nil). No charity trustee received payment for professional or other services supplied to the charity (2019: £nil).

The key management personnel of the parent charity, the Trust, comprise the trustees, the Chief Executive Officer, Finance Director, and Artistic Director of Arts Theatre Trust. The total employee benefits of the key management personnel of the Trust were £165,301 (2019: £162,060).

The key management personnel of the group comprise those of the Trust and the key management personnel of its wholly owned subsidiary HTC Ltd. The key management personnel of HTC Ltd are the Chief Operating Officer and the Commercial Manager whose employee benefits total £73,001 (2019: £70,002). The employee benefits of key management personnel for the group were therefore £238,302 (2019: £232,062).

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Key Terms

Staff cost

Termination costs

Employee Benefits

Key Management Personnel




Recap on what is included in employee benefits

- **Employee benefits** include all costs incurred by the charity in exchange for the services (to the charity) by its employees and any remunerated trustees
- **MUST** recognise liabilities for the cost of benefits that employees are entitled to (even if not yet paid)



Recap on what is included in employee benefits

- **all remuneration,**
 - salary,
 - benefits,
 - profit-sharing and
 - bonuses,
- employer's **pension** contributions and
- any **termination payments** made.
- For employers with employee members of a defined benefit (DB) pension scheme, employee benefits include elements of the costs of scheme

A photograph of a beach at night. The sand is dark, and there is a small fire or light source on the sand, creating a bright spot. The background is dark, possibly the ocean or a dark sky.

A Charity MUST
recognise
liabilities for the
cost of benefits
that employees
are entitled to
(even if not yet
paid)

Recap: when to accrue for termination benefits

FRS102 (28.34) An entity **shall recognise termination benefits** as a liability and an expense only when the **entity is demonstrably committed** either:

1. To terminate the employment of an employee or group of employees before the normal retirement date; **or**
2. To provide termination benefits as a result of an offer made in order to encourage voluntary redundancy.

An entity is only **demonstrably committed** to a termination when:

- It has a **detailed formal plan for the termination**; and
- Is **without realistic possibility of withdrawal** from the plan.

If an entity is not demonstrably committed to a termination, it must not recognise a redundancy provision or the related expense.

For a redundancy provision to be recognised in the accounts, there must either be a legal or constructive obligation existing at the balance sheet date.



Measuring employee benefits

- Short-term employee benefits are measured at the amount expected to be paid in exchange for that service.
- A liability for paid annual leave and paid sick leave is recognised, if a material
- **Termination benefits** are measured at the best estimate of the expenditure required to settle the obligation at the reporting date.
- Post-employment benefits arising under defined benefit plans

Other Staff Cost Disclosures

Higher Paid Staff Disclosures

All charities **must** disclose the number of employees whose total **employee benefits** (excluding employer pension costs) for the reporting period fell within each band of £10,000 from £60,000 upwards.

The number of employees whose emoluments as defined for taxation purposes amounted to over £60,000 in the year was as follows:

	GROUP		CHARITY	
	2023 number	2022 number	2023 number	2022 number
£60,001 - £70,000	10	9	10	9
£70,001 - £80,000	7	6	7	6
£80,001 - £90,000	4	2	5	2
£90,001 - £100,000	5	4	5	4
£100,001 - £110,000	-	2	-	2
£110,001 - £120,000	1	-	1	-
£120,001 - £140,000	-	3	-	3
£140,001 - £150,000	1	-	1	-
£150,001 - £160,000	1	-	1	-
£160,001 - £170,000	2	-	2	-
£170,001 - £200,000	-	1	-	1
	<u>33</u>	<u>27</u>	<u>32</u>	<u>27</u>

Key management personnel - disclosures

All charities **must** disclose the **total amount** of any **employee benefits** received by trustees and its key management personnel for their services to the charity.

The key management personnel of the parent charity, the Trust, comprise the trustees, the Chief Executive Officer, Finance Director, and Artistic Director of Arts Theatre Trust. The total employee benefits of the key management personnel of the Trust were £165,301 (2019: £162,060).

The key management personnel of the group comprise those of the Trust and the key management personnel of its wholly owned subsidiary HTC Ltd. The key management personnel of HTC Ltd are the Chief Operating Officer and the Commercial Manager whose employee benefits total £73,001 (2019: £70,002). The employee benefits of key management personnel for the group were therefore £238,302 (2019: £232,062).

An aerial photograph of a small white boat on a vast, deep blue ocean. The water's surface is textured with ripples and small waves, creating a rich, dark blue color. The boat is positioned in the lower-left quadrant of the image, moving towards the right. The overall scene is serene and expansive.

Reminder

SORP Information Sheet 1
(implementation issues)

Reminder

KMP employee benefits vs Highly Paid staff (Over £60k)

Inclusion of Employers National Insurance Contributions (NIC) as part of employee benefits

When calculating employee benefits for the disclosure of remuneration and benefits received by **key management personnel**, per paragraph 9.32 of the SORP, the definition of employee benefits should be in accordance with paragraph 28.1 of FRS 102.

As a result, **Employers** National Insurance Contributions (NIC) **should** be included, in accordance with paragraph 28.4(a) of FRS 102.

However, when identifying numbers of employees to disclose who received employee benefits of more than £60,000, per paragraph 9.30, **Employers** NIC should be **excluded**.

KMP - Disclosures

The number of employees whose emoluments as defined for taxation purposes amounted to over £60,000 in the year was as follows:

	GROUP			
	2021 number	2022 number	2023 number	2024 number
£60,001 - £70,000	10	9	10	9
£70,001 - £80,000	7	6	7	6
£80,001 - £90,000	4	2	5	2
£90,001 - £100,000	5	4	5	4
£100,001 - £110,000	-	2	-	2
£110,001 - £120,000	1	-	1	-
£130,001 - £140,000	-	3	-	3
£140,001 - £150,000	1	-	1	-
£150,001 - £160,000	1	-	1	-
£160,001 - £170,000	2	-	2	-
£190,001 - £200,000	-	1	-	1
	<u>33</u>	<u>27</u>	<u>32</u>	<u>27</u>

= Salary + benefits, + profit-sharing + bonuses + termination payments

The key management personnel of the parent charity, the Trust, comprise the trustees, the Chief Executive Officer, Finance Director, and Artistic Director of Arts Theatre Trust. The total employee benefits of the key management personnel of the Trust were £165,301 (2019: £162,060).

= Salary + benefits, + profit-sharing + bonuses + termination payments + **ER's Pension + ER's NIC**

Note employee benefits includes termination payments – but you don't need to name individuals and just one total figure is disclosed.

Topic 3:

Termination Benefits: Ex-gratia and severance payments





Ex-gratia payments

Charity law definition

An ex-gratia payment is a payment, or the waiver of a right to an asset which the trustees have no legal obligation or legal power to make from a charity's funds but which they believe they have a moral obligation to make.

Ex-gratia: Employment -v- Charity law

- Ex-gratia, means different things in different contexts
- Severance payments/Settlement agreements and “ex gratia payments”
- Employment ex-gratia = typically a financial incentive but no contractual obligation
- Charity law ex-gratia = payment made due to strong sense of moral obligation.
- Employment ex-gratia ≠ Charity law ex-gratia
- Charity Commission authorisation process requirements are different
- Both caught by disclosure requirements



Termination benefits

What are Termination benefits

Termination benefits, are Employee benefits provided in exchange for the termination of an employee's employment as a result of either:

- a) an entity's decision to terminate an employee's employment before the normal retirement date; or
- b) an employee's decision to accept voluntary redundancy in exchange for those benefits.

A liability may be committed, by legislation, by contractual or other agreements with employees.

In practice this includes all of these:

- Redundancy payments
- Compensation for loss of office
- Payment in lieu of notice (PILON)
- Severance payments
- Termination payments
- Compensation payments
- **Ex-Gratia payments (in relation to termination payment)**
- Dismissal costs
- Contractual and non-contractual payments



Termination benefits

Disclosure Requirements Termination benefits

S28.43 of FRS102 and **SORP 9.27** say:


For any **redundancy or termination payments** relating to the reporting period, charities must state:

- the total **amount** for the reporting period;
- the **nature** of the payment;
- its accounting **policy**; and
- the amount **due** in **creditors** at the year end

This must be done in **aggregate** for each **category** of termination benefits that an entity provides to its employees.

Category is not defined – but typically you have:

- Redundancy
- Voluntary redundancy
- Contractual payments
- Non-contractual payments (See ex Gratia payments for further disclosure)



All (not just salary related) Ex-gratia payments

Disclosures

Ex-gratia payments

No de-minimis & SORP requirement

Must disclose details of **all** ex-gratia payments made including those where the charity has obtained the authority of the Court, the Attorney General or the charity regulator for the jurisdiction(s) of registration to sanction the payment or waiver.

Charities may aggregate payments of a similar nature (but not type) where this does not impact on the understanding of the arrangement.

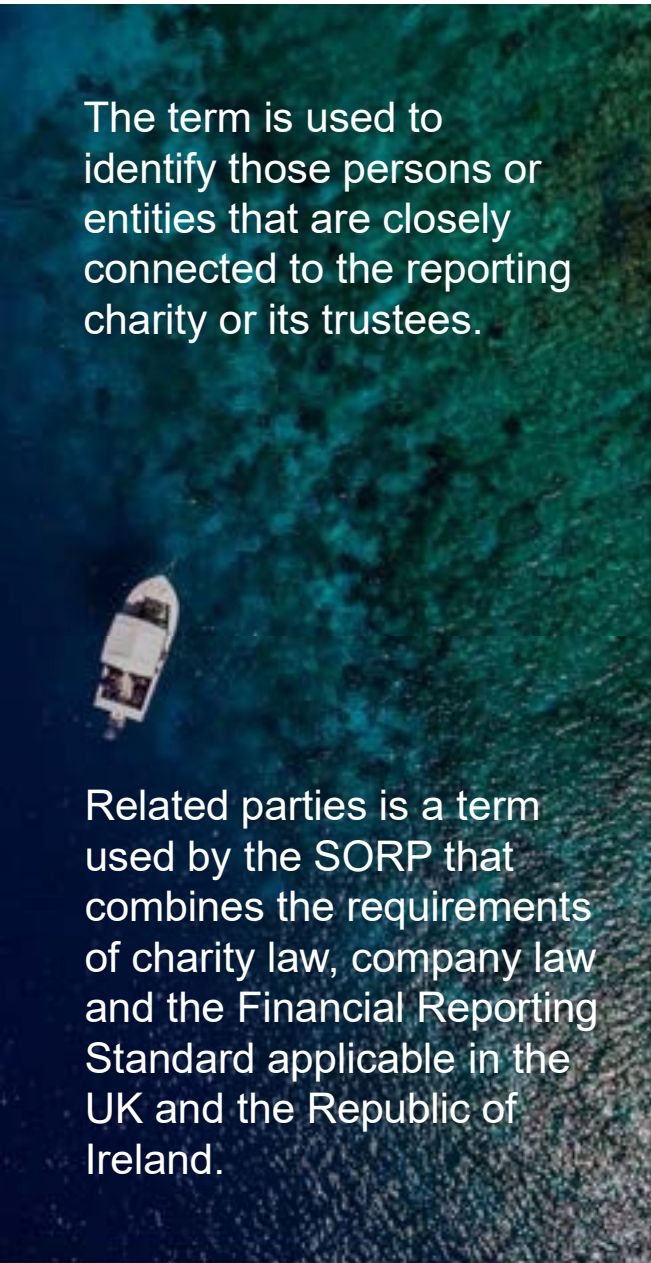
SORP **requires**: for **each** payment (or in aggregate) the notes to the accounts must:

- provide an explanation of the **nature** of the payment;
- state the **legal authority** or **reason** for making the payment; and
- state the **amount** of the payment (or value of any waiver of a right to an asset).

You don't have to name the person (or do you?)

For the purposes of disclosure, occasional gifts of small and inexpensive items such as flowers or chocolates should not be regarded as ex-gratia payments.

**Topic 4:
Additional considerations for Related Party
Transactions (inc Key management personnel)**

An aerial photograph of a small white boat with a dark cabin, floating on clear, turquoise water. The water's surface is textured with ripples and small waves, and the overall color palette is dominated by shades of blue and green.

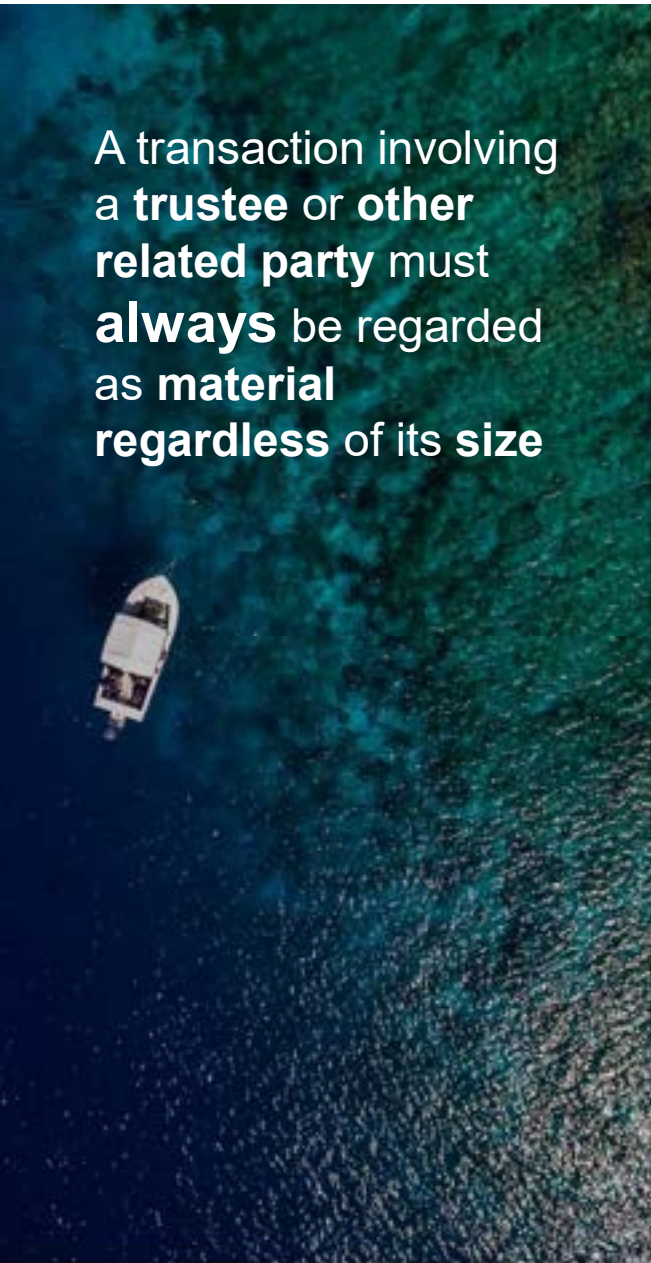
The term is used to identify those persons or entities that are closely connected to the reporting charity or its trustees.

Related parties is a term used by the SORP that combines the requirements of charity law, company law and the Financial Reporting Standard applicable in the UK and the Republic of Ireland.

Key management personnel definition recap

The following 'natural persons' are classed as related parties:

- A. any charity **trustee** and custodian trustee of the charity;
- B. a person who is the donor of any land to the charity (whether the gift was made on or after the establishment of the charity); and
- C. C. any person who is:
 1. a child, parent, grandchild, grandparent, brother or sister of any such trustee (A) or donor (B) of land;
 2. an officer, agent or a **member of the key management personnel** of the charity;
 3. the spouse or civil partner of any of the above persons (A, B, C1 and C2);
 4. carrying on business in partnership with any of the above persons (A, B, C1, C2 and C3);
 5. a person, or a close member of that person's family, who has control or joint control over the reporting charity;
 6. a person, or a close member of that person's family, who has significant influence over the reporting charity

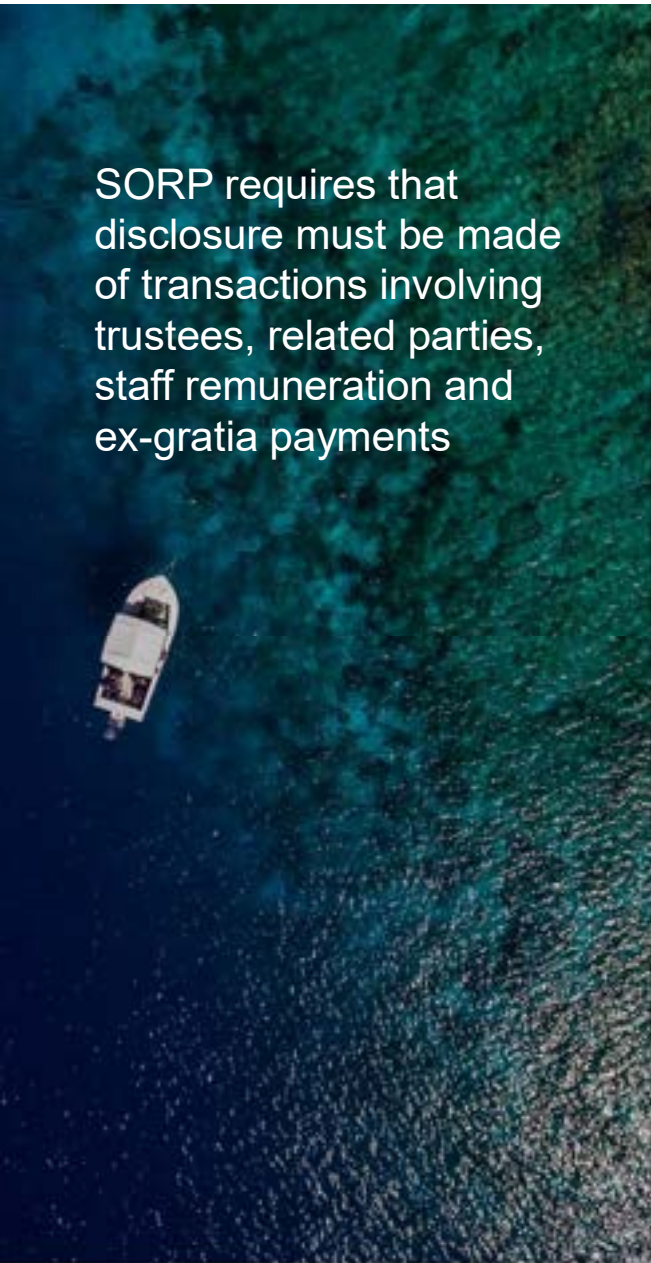


A transaction involving a trustee or other related party must **always** be regarded as material regardless of its size

Related Party Transaction (Payments to Trustees) Disclosures

Following information **must** be provided for each individual trustee who received remuneration or other benefits in the reporting period:

- the legal **authority** under which the payment was made (for example a provision in the governing document of the charity, an Order of the Court, or the charity regulator for the jurisdiction(s) of registration);
- the **name** of the remunerated trustee;
- details of **why** the remuneration or other employment benefits were paid;
- the **amount** of remuneration paid;
- the amount of any **pension** contributions paid by the charity for the reporting period; and
- the **amount** of any **other benefit**, for example any **termination benefits**, private health cover or the provision of a vehicle.

An aerial photograph of a small white boat on a vast, deep blue ocean. The water's surface is textured with ripples and small waves. The boat is positioned in the lower-left quadrant of the image, moving towards the right.

SORP requires that disclosure must be made of transactions involving trustees, related parties, staff remuneration and ex-gratia payments

Related Party Transactions - Key management personnel

9.20. All charities that have one or more related party transactions must disclose:

- the description of a relationship between the parties (including the interest of the related party or parties in the transaction);
- a description of the transaction(s);
- the amounts involved;
- outstanding balances with related parties at the reporting date and any provisions for doubtful debts;
- any amounts written off from such balances during the reporting period;
- the terms and conditions, including any security and the nature of the consideration to be provided in settlement;
- details of any guarantees given or received; and
- any other elements of the transactions which are necessary for the understanding of the accounts; and
- **this SORP requires the disclosure of the name(s) of the transacting related party or parties.**

So what happens if an ex-gratia payment is made to a member of KMP?

IT'S NOT CLEAR!

Ex-gratia payment made to member of KMP

It may depend on if the ex-gratia payment is related to termination payment!

What are Termination benefits

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A liability may be committed, by legislation, by contractual or other agreements with employees.

In practice this includes all of these:

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- Dismissal costs
- Contractual and non-contractual payments

9.32. All charities must disclose the total amount of any employee benefits received by trustees and its key management personnel for their services to the charity. The trustees of charities, particularly larger charities, should give consideration to the information needs of their funders and other stakeholders in making their accounting disclosures. For example, it may be helpful to provide details of the employee benefits received by the charity's Chief Executive Officer or highest paid staff member, or alternatively a charity may choose to disclose the amount of employee benefits paid to its key management personnel on an individual basis.

If it IS related to termination payment – is it already covered by **SORP 9.27, 9.25 & 9.32** (disclosure in aggregate – no individuals named) ?

If it is NOT related to termination payment – does it fall into **SORP 9.20** (individuals named)?

General consensus is yes.

BUT it's not very clear!

Spirit of the SORP 9.32?



Our worked example

Example

Lesley is the FD of the Arts Theatre Trust. During the year Lesley's employment is terminated. After formal discussions with HR are held the following agreement is reached.

Lesley will be given £10k as a contractual payment in lieu of notice along with a further non-contractual payment of £5k.

A non-disclosure agreement is signed as part of the agreement prohibiting either side from disclosing the agreement.

Additionally there is another voluntary redundancy during the year for a member of the box office staff – the contractual amount paid was £5k.

What do we need to disclose?

Our worked example

Lesley the FD is a member of KMP

We conclude the ex-gratia payment is a termination payment

Answer

1. There are total termination payments of £20k - £15k to Lesley and £5k to the box office assistant.

2. These are made up of two types of payment in nature – contractual and non-contractual – we therefore need to disclose the amounts, nature, accounting policy and any amount in creditors at YE.

However – as there is a NDA in place the trustees do not want to make the disclosure regarding the £5k ex-gratia payment to Lesley. They are arguing that this amount is not material in value.

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Topic 5: Audit Issues

© MHA



An aerial photograph of a coastline. A narrow, light-colored strip of land or sand runs vertically through the center, separating a darker, reddish-brown area on the left from a blue-green body of water on the right. There are a few small, dark spots on the land strip, possibly buildings or trees.

Audit Issues

Non-disclosure

A Charity MUST recognise liabilities for the cost of benefits that employees are entitled to.

For any redundancy or termination payments relating to the reporting period, charities must state:

- the total **amount** for the reporting period;
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- its accounting **policy**; and
- the amount due in **creditors** at the year end

This must be done for each **category** of termination benefits that an entity provides to its employees.

Charities **Must** disclose details of **all** ex-gratia payments made



Aerial view of a coastline with a narrow beach and shallow water. The beach is light-colored sand, and the water is a mix of light blue and green. There are some small structures or markers on the beach.

Audit Issues

Non-disclosure

There is **no** exemption from this disclosure requirement in FRS 102 or the Charities SORP

Non-disclosure of termination payments is therefore **non-compliance** with FRS 102 and the Charities SORP.

Impact on the auditor's report

Where a charity does not disclose the details of termination payments due to the presence of a NDA, if the impact is material (and it often is material by nature even if not amount), the auditor is likely to need to **qualify the auditor's report** in line with ISA (UK) 705.

In the case of non-disclosure of information required to be disclosed in the financial statements, ISA (UK) 705 paragraph 23 effectively requires the auditor to disclose that information and **include the omitted disclosures within the auditor's report.**

Topic 6: NDAs –v- Audit disclosure





NDAs -v- Audit disclosure

- Will audit disclosure give rise to a breach of contract?
- What does the contract say?
- What is the risk?
- Use of NDAs: direction of travel:
 - New legal requirements
 - Regulatory guidance
 - SRA
 - Law Society
- Proper advice!

Questions?

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