

EXPLANATORY MEMORANDUM TO

THE FURTHER EDUCATION BODIES (INSOLVENCY) REGULATIONS 2019

2019 No. 138

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this SI is to make modifications to insolvency legislation (and insolvency-related legislation) to enable that legislation to operate effectively in its application by the Technical and Further Education Act 2017 (TFEA) to statutory corporations (further education corporations and sixth form college corporations). The instrument also applies and modifies provisions of the Companies Act 2006 in relation to documents to be filed with the registrar of companies for statutory corporations. Some modifications are also made to various legislation to reflect education administration, which will apply to statutory corporations as well as companies which run designated further education institutions. Education administration is a special administration regime provided for by TFEA.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies to England and Wales only because it applies to further education bodies in England and Wales. Further education bodies are defined in section 4 of TFEA and are limited to such bodies in England and Wales.
- 3.3 The instrument does not have any minor or consequential effects outside England and Wales.
- 3.4 In the view of the Department, for the purposes of House of Commons Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this instrument would be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter or the Scottish Parliament if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.
- 3.5 The Department has reached this view because education and insolvency are both transferred matters under the Northern Ireland Act 1998 (not being either excepted matters under Schedule 2 or reserved matters under Schedule 3). In relation to Scotland, education is within the legislative competence of the Scottish Parliament because it is not a reserved matter under Schedule 5 to the Scotland Act 1998. The Scottish Parliament also has legislative competence over the insolvency of business associations which are public bodies established by an enactment, as these are not

reserved under Schedule 5 (by virtue of an exception to the reservation contained in the definition of “business interests” in C2 of that Schedule, which applies to FE and sixth form colleges, being public bodies created by or under an enactment).

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is set out in Section 3 under “Matters relevant to Standing Order Nos. 83P or 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)”.

5. European Convention on Human Rights

- 5.1 The Minister of State for Apprenticeship and Skills has made the following statement regarding Human Rights:

“In my view the provisions of the Further Education Bodies (Insolvency) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 6 of TFEA applies normal insolvency procedures to Further Education (“FE”) bodies in England and Wales, which are statutory corporations. Specifically it makes available the following insolvency procedures:
- voluntary arrangements
 - administration
 - creditors’ voluntary winding up, and
 - winding up by the court.
- 6.2 The application of those provisions (found in the Insolvency Act 1986 and legislation made under that Act and described in TFEA as “relevant insolvency legislation”) is subject to omissions and modifications made by the Secretary of State in regulations. This instrument makes those modifications and omissions to the relevant insolvency legislation enabling the relevant insolvency legislation to operate effectively for statutory corporations.
- 6.3 TFEA also gives the Secretary of State the power to apply and amend legislation about insolvency as a consequence of the application of insolvency legislation to statutory corporations. This is legislation which refers to anything which may be done under the Insolvency Act or legislation made under it. This instrument applies and modifies certain legislation about insolvency.
- 6.4 TFEA also gives the Secretary of State the power to make regulations about the delivery of documents to the registrar of companies. Many filing provisions are contained in the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016, which have been directly applied to statutory corporations. In addition, though, this instrument applies and modifies provisions of the Companies Act 2006 to statutory corporations to enable Companies House to have the proper powers to create and maintain records about statutory corporations, which have entered into insolvency proceedings.

6.5 Parts of the SI (Part 3 and regulation 39) apply to companies operating designated further education institutions as well as statutory corporations, as they operate to make modifications to facilitate the operation of the special administration regime.

7. Policy background

What is being done and why?

- 7.1 A proportion of FE colleges have fallen into financial difficulty for a variety of reasons. In response to a particular period of decline, in 2015 a programme of Area Reviews was launched across England. Implementation of the recommendations of the Area Reviews (supported by funding through the Restructuring Facility (RF)), will reduce the possibility of future financial failure in some weak colleges, including through reorganisation and merger, but it does not remove it altogether. While we would expect such instances to be exceptional and uncommon, we must ensure that a process is in place to deal with colleges that become unable to pay their debts once Exceptional Financial Support and the RF come to an end in April 2019.
- 7.2 Alternative approaches to legislation were considered prior to developing the primary legislation (TFEA). It was decided that a legislative approach would be most appropriate. Government's over-riding objectives, within further education, are providing for learner protection without the need to financially support non-viable colleges, whilst also providing for orderly processes and rescue mechanisms for colleges which fail financially. We did not consider that there were any other measures that would offer equal or better protection to learners who have been placed in difficulty as a result of an institution becoming insolvent and meet these other key objectives. We therefore considered that in order to protect learners in the event of a college becoming insolvent and meet the other objectives, it is necessary to introduce an insolvency regime for FE and sixth form colleges that addresses the specific characteristics of the sector.
- 7.3 In 2016, the Government set out for consultation, proposals for the introduction of an insolvency regime for the FE and sixth form college sector, which aim to provide better value for money than the current approach of providing "Exceptional Financial Support" (EFS).
- 7.4 Responses to the policy consultation were received from a range of stakeholders representative of the sector, including individual colleges, their representative bodies, lenders to the sector and insolvency practitioners. Overall, these responses supported the development of the insolvency regime, particularly the special administration regime, and the proposals were enacted in TFEA which received Royal Assent on 27 April 2017.
- 7.5 The regime will:
- Ensure there is an orderly process for managing a college insolvency once funding for the current restructuring facility for the sector ends;
 - Reduce the reliance on government funding when colleges fail (currently provided through EFS); and
 - Through the Special Administration Regime, allow for student provision to be protected in the unlikely event that a college becomes insolvent.
- 7.6 In making modifications to the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016, we have deliberately excluded some offences which would

otherwise apply to student members of statutory corporations. In the general modification made by the Regulations, “director” will be read as including “member” of the FE corporation, which would include student member. Statutory corporations are required to have student members by virtue of the Further and Higher Education Act 1992. However, student members will have a limited role in the running of the statutory corporation and are frequently not involved in financial decisions. We considered in those circumstances that it was appropriate to exclude student members from liability for offences where they might not have been able to influence the direction of the corporation and thus the matter which would give rise to the offence. It would not be the Department’s intention to discourage students from becoming student members, by exposing them to a potential criminal penalty for the first time. Some offences remain, however, in circumstances where student members give false statements, as these matters are within their own control.

7.7 There are two SIs that will implement the further education insolvency regime set out in the Act:

- a) The Further Education Bodies (Insolvency) Regulations (this instrument); and
- b) The ‘Further Education Administration Rules’ will be a Special Administration Regime SI that will set out insolvency rules for a Special Administration Regime called Education Administration.

7.8 The Department published a technical consultation on the development of the instrument in December 2017, which attracted 30 responses. These were mainly from sector specific stakeholders rather than the wider public.

7.9 There are currently 37 FE colleges that have a “published Notice to Improve for financial health”. However as we have a robust monitoring and intervention programme in place to manage these cases; in reality we expect that FE colleges entering insolvency would be a very rare event.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 This instrument does not amend any other secondary legislation, and is the first time the power is being used, so consolidation is not appropriate.

10. Consultation outcome

10.1 The Department for Education published a consultation on the regulations, which ran from 18 December 2017 to 12 February 2018, titled “Insolvency regime for further education and sixth form colleges: technical consultation”.

10.2 The consultation received 30 formal responses. The Government response to the consultation is available at: <https://www.gov.uk/government/consultations/insolvency-regime-for-further-education-and-sixth-form-colleges>. Two out of the 10 questions in the consultation related specifically to this instrument.

10.3 The first question asked if any specific modification to normal insolvency legislation were needed to allow it to apply effectively to FE and sixth form corporations. Respondents showed strong support for the FE insolvency regime mirroring standard insolvency procedures for companies, which is the approach that we have taken.

Several respondents suggested that, to protect creditors, we should put an interim moratorium into place during the 14-day notice period for the Appropriate National Authority¹ to consider whether to enter into special administration. We agreed with this suggestion and have put the interim moratorium into place.

- 10.4 The second question related to the filing process for FE colleges. Again there was strong support to mirror company insolvency filing, which we have done. Several respondents to the consultation raised concerns about the logistics of this process. We have been working closely with Companies House to create a filing system, which allows for the efficient filing of insolvency documents. As FE and sixth form corporations are not routinely registered with Companies House, unlike companies, we made a number of modifications to allow the creation of an initial record of the FE and sixth form college at Companies House (this includes the FE body's name and address) in the case that it is subject to an insolvency procedure requiring documents to be filed. This will then allow Companies House to receive and file insolvency documents in the usual way. This approach has addressed the points raised by stakeholders during the consultation.

11. Guidance

- 11.1 The Department will publish two sets of guidance before this instrument comes into force. Neither set of guidance is a statutory requirement and will not need to be ready for laying as much of the information that will be contained within it has already been set out in the Bill and secondary legislation consultations. It is not required in order to interpret the instrument, and would not be required by insolvency practitioners to understand the legislation. It is intended as a guide for those within the FE sector, particularly college governors, who may not be familiar with the concept and processes of insolvency, particularly those of a special administration.
- 11.2 The first set will provide guidance to governors on their duties and liabilities under insolvency law and will form part of wider up to date guidance to governors on good governance and financial management.
- 11.3 The second set of guidance will provide a high-level overview of applicable ordinary insolvency processes as well as key modifications that we have made to ordinary insolvency to make it work for the FE sector. It will also provide a high-level overview of the special administration regime.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is expected to be minimal. The central estimate of the impact is £39,184 for all FE colleges (283). This is mainly for familiarisation costs of the regulations. The central indicative estimate for familiarisation costs of the regulations is based on 100 FE colleges who could meet the current triggers for a notice to improve for financial health over the next 10 years. Also all colleges (283) will need to gain a high level of understanding of the insolvency regime.

¹The 'Appropriate National Authority' is defined in TFEA and (a) in relation to a further education body in England, means the Secretary of State; (b) in relation to a further education body in Wales, means the Welsh Ministers.

- 12.2 The impact on the public sector is expected to be positive as an insolvency regime will provide better value for money than the current approach and the special administration regime specifically provides for the protection of provision to existing learners at an insolvent college.
- 12.3 An Impact Assessment was not produced for this regulation because of the minimal impact on businesses, charities or voluntary bodies. The Department has conducted an assessment of the impact, which is available from the Department for Education, Higher and Further Education Directorate, Sanctuary Buildings, Great Smith Street, London SW1P 3BT.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses. To note only a small proportion of FE colleges would be classed as small businesses i.e. with a workforce of less than 50.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 These regulations are not considered to have a disproportionate impact on small businesses. This legislation will only take effect in the rare event of an insolvency rather than being an ongoing obligation on FE colleges. Under ordinary and well-established company insolvency there is no distinction drawn in the treatment of small businesses and other businesses in the event of an insolvency. Therefore we have mirrored this approach.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is to monitor the effect of both the TFEA and this legislation (with the Rules to implement the special administration regime provided for by TFEA, which will contain a statutory review clause) and will take place to assess whether that legislation in its totality creates any unexpected burdens or tensions within the FE sector.
- 14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2005 the Minister of State for Apprenticeships and Skills has made the following statement:
- “In my view the provisions of the Further Education Bodies (Insolvency) Regulations do not require the addition of a review clause under the provisions of the Small Business, Enterprise and Employment Act 2015. The potential benefit of including a review clause would be outweighed by the disproportionate costs of conducting such a review, given that the requirements of this SI have been estimated to have minimal additional impact on business and fall well below the £5m annualised net business impact. Furthermore the primary burden is in primary legislation, which the SoS is not obliged to review, and therefore a review here would be burdensome, and not in any event affect the primary legislation. Finally, government expects insolvency of FE and sixth form corporations to be a rare event.

15. Contact

- 15.1 Kathryn Norton at the Department for Education, Telephone: 07823 535 245 or email: Kathryn.NORTON@education.gov.uk, can answer any queries regarding the instrument.

- 15.2 Jeremy Benson, Deputy Director for FE Financial Resilience and Sustainability, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Right Honourable Anne Milton MP, Minister of State for Apprenticeship and Skills at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.