Department
for Education

Insolvency regime for further education and sixth form colleges

Government response to technical consultation

June 2018

Contents

1. Introduction

The Technical and Further Education Act 2017 ('the 2017 Act') has established a new insolvency regime that applies to further education and sixth form colleges in England and Wales. This insolvency regime was introduced to provide orderly winding-up and other insolvency proceedings in the unlikely event of a further education or sixth form college becoming insolvent. The regime provides similar provisions to those applying to companies and other organisations in the UK. The 2017 Act has also introduced a special administration regime for the college sector, known as an education administration, which protects learner provision for existing students at insolvent colleges.

Our technical consultation on this insolvency regime ran from 18 December 2017 to 12 February 2018, and sought comments in relation to the following:

- The insolvency provisions established by the 2017 Act;
- How those provisions will be implemented;
- The technical detail of the insolvency regime that will be included in secondary legislation; and
- Proposals as to how colleges at risk of or in insolvency will be dealt with in practice.

The consultation invited respondents to provide comments on areas of the proposals which they believed needed to be altered or that required further explanation. The consultation also allowed respondents to alert us to individual circumstances that required particular consideration within the regime. We obtained views from individuals, further education colleges and sixth form colleges, representative organisations, insolvency practitioners and financial and legal firms. The consultation ran for eight weeks and we offered respondents the opportunity to submit their comments through an online system, by email or post, through accessible documents on request, and via discussions at events and forums.

2. Summary of responses received

The consultation received 30 formal responses, and additional comments were recorded from discussions at a number of events and forums during the consultation period. A list of formal respondents to the consultation can be found at Annex A.

Responses by sector

The following sectors contributed this proportion of responses:

- Further education colleges and sixth form colleges (33.3%)
- Related organisations (e.g. trade unions, education organisations) (30%)
- Legal, accountancy and other related firms with an interest in insolvency (13.3%)
- Pension funds (6.7%)
- Financial institutions (6.7%)
- Local authorities/combined authorities (6.7%)
- Insolvency practitioners, their practices and regulatory compliance firms (3.3%)

The largest sector represented was further education colleges and sixth form colleges with 10 responses.

The consultation posed 10 questions about the Government's proposals for the insolvency regime for further education and sixth form colleges. The total number of responses to each questions is summarised below:

Question	Total number of responses
Question 1: When considering the normal insolvency procedures outlined above (Company Voluntary Arrangement, administration, creditors' voluntary winding up, winding up by the court and receivership), are there any specific modifications that you believe are required in order to apply them effectively to FE bodies? Please provide explanations for any of these.	18
Question 2: Who do you believe should be specified to receive: a. Notice of an education administration application; b. Notice of an education administrator's appointment; c. A copy of the education administrator's proposals? Please provide justification for your answers.	 20 19 20

Question	Total number of responses
Question 3: Is there any specific information that you would expect the education administrator's proposals to contain? Please provide an explanation for your answer.	18
Question 4: Do you have any other comments or views on the process of education administration?	18
Question 5: Do you have any comments about how the filing process could work for FE bodies?	17
Question 6: What particular aspects or issues would you find it useful for the guidance for governors to cover?	22
Question 7: Do you have views on how monitoring and intervention can be further improved to identify cases of financial distress and work with those colleges to improve their financial position and avoid insolvency? (Please be clear whether you are responding in relation to colleges in England or colleges in Wales).	22
Question 8: How could ESFA and the FE Commissioner work with and support colleges in England to help them self-identify financial difficulties at an early stage?	16
Question 9: Do you have views on how the Independent Business Review process for an FE college should work, and who should be consulted?	20
Question 10: Do you have any further comments on any aspects of our proposals (including our impact or equalities assessments)?	13

3. Question analysis

Question 1

When considering the normal insolvency procedures outlined (Company[1] Voluntary Arrangement (CVA), administration, creditors' voluntary winding up, winding up by the court and receivership), are there any specific modifications that you believe are required in order to apply them effectively to FE bodies? Please provide explanations for any of these.

A total of 18 responses were received for this question.

Three respondents showed strong support for the FE insolvency regime mirroring standard insolvency for companies. One respondent stated that it would help to reduce misunderstanding and complexity, providing clarity for those in the sector and others that work with and supply it. One respondent stated that there was little need for significant modifications other than technical changes to extend application to FE bodies and college governors, while a further respondent stated that CVAs and administration seem to be applicable without amendments. Two respondents stated that Government would be likely to need to make amendments once the system had been fully tested.

The 2017 Act sets out that if anyone initiates another applicable insolvency procedure under the Insolvency Act 1986, the appropriate national authority[2] (ANA) must be notified and then has 14 days to decide whether to apply to court for an education administration order. Three respondents commented on this 14 day notice period. One respondent said it should be longer. One respondent said that there should be an ability to shorten it, as this would reduce the period that colleges are not protected by a moratorium. Another one said it should be shortened to five days to be consistent with the equivalent period of notice given to a qualifying floating charge-holder under the Insolvency Act 1986 Schedule B1, paragraph 26.

There was a total of five comments about moratoriums. Three suggested putting a moratorium in place for the 14 day notice period. One suggested that all FE bodies should be able to file for a moratorium in the case of a CVA, which would have the potential for a CVA to be more successful, reducing the costs and disruptions associated

---

[1] It should be noted that the 2017 Act confirms the definition of "company" as a company within the meaning of the Companies Act 2006. The process of modifying normal insolvency legislation to apply to FE colleges will therefore see the term 'company' replaced by the term 'further education corporation' wherever appropriate. However, we confirmed in the Government response to the summer 2016 consultation that we would not be amending the name of this insolvency procedure and hence would be continuing to use its official title of 'Company Voluntary Arrangement' even when it applies to colleges, as it is a recognised and well-understood term.

[2] The 2017 Act defines the term 'appropriate national authority' in this context to mean the Secretary of State when in relation to a further education body in England; and the Welsh Ministers when in relation to a further education body in Wales. We will therefore use the term 'appropriate national authority' (or 'ANA') in this document.

with an administration process. One respondent was concerned that the inability of creditors being able to enforce security in the 14 day period could have a detrimental impact on them due to possible deterioration in the college's financial position in this period.

Three respondents suggested that the monitoring and intervention arrangements should be tested first, before considering implementing the formal insolvency regime.

Three respondents had comments around the need for clarity as to who can initiate a normal insolvency procedure; that both CVA and creditors' voluntary winding up require member approval or resolutions; and that members of a company are different to members of the governing body.

Other comments included one respondent stating that a normal administration appointment requires a "notice of appointment" to have been given to the ANA. As this is a "notice of appointment", it will be a period of 14 days when the administrator has been appointed but the administration is not effective. The respondent suggested that a modification should be made so that the notice to the ANA is the "notice of intention to appoint" rather than "notice of appointment".

One respondent stated that they believed that Transfer of Undertakings (Protection of Employment) (TUPE) arrangements should apply in the case of staff being transferred to another provider, and that consultation with staff should take place well before any insolvency procedures are triggered.

Government response

Further education and sixth form college corporations in England and Wales and sixth form college corporations in England are not covered by existing normal insolvency law. Therefore, the 2017 Act applies ordinary insolvency law to those bodies. The 2017 Act also provides the Secretary of State with the power to make secondary legislation modifying existing insolvency legislation so that it applies appropriately and effectively to those bodies.

The insolvency procedures which are being applied to FE bodies that are statutory corporations are as follows:

- voluntary arrangements (specifically a Company Voluntary Arrangement);
- administration;
- creditors' voluntary winding up;
- winding up by the court; and
- receivership.

The approach being taken to develop the secondary legislation is that it will mirror existing company insolvency law for companies as much as possible. However, to make it work for the FE sector, a number of modifications are required across existing insolvency procedures that will apply to FE bodies.

The Government acknowledges that there may be concerns around the 14 day notice period. However, this has been set out in primary legislation, and we do not have the power to modify it. Our reasoning for proceeding with the 14 day notice period was set out in the consultation during the summer of 2016 and the Government response to that consultation. It was agreed by most respondents to that consultation to be a reasonable notice period and, given that it was in line with the notice period used in other special administration regimes, was applied for an education administration.

The Government agrees that there needs be a moratorium for the 14 days during which the ANA is considering whether to make an education administration order, and we will put that into place for statutory corporations. We have considered the point raised about the impact on creditors from putting a moratorium in place and have concluded there is unlikely to be a detrimental impact.

The system of monitoring and intervention, operated through the Education and Skills Funding Agency (ESFA) and the office of the Further Education Commissioner (for colleges in England) is already in place, and we do not consider it necessary to delay the implementation of the insolvency regime and run the risk of it being unavailable for use should it be required in a particular case.

The Government recognises that FE corporations do not have directors, contributories or members in the same way as a company. It also recognises that there are certain insolvency procedures that require directors, contributories or members to pass resolutions or approve courses of action. We have therefore proposed a modification that provides definitions for the equivalent of members in an FE corporation. This will allow for decision-making functions to be performed without imposing any liabilities on FE corporation members.

We have considered whether it is possible to add a requirement to issue “notice of intention to appoint”. However, the phrase “notice of appointment” is in primary legislation and the Government does not have the power to change this.

We stated in the Government response to our previous consultation on the insolvency regime that TUPE would likely apply in the event of college insolvency and associated transfer, and the education administrator would have the power to ensure the principles of TUPE would apply under the provisions of a transfer scheme as part of an education administration. However, it might not be possible to begin consultation on staff transfers in advance of insolvency processes being triggered – meaningful consultation could not commence until an education administrator was satisified that a transfer was needed to help to achieve the objective of an education administration.

Question 2a

Who do you believe should be specified to receive notice of an education administration application? Please provide justification for your answers.

A total of 20 respondents provided comments on this question. The most common suggestions for recipients (with numbers of responses in parentheses) were the college/governing body/college clerks/company secretaries (10); creditors (9); the student body/learners (or a body representing them such as a students' union) (5); Local Authorities/Combined Authorities/Mayoral Combined Authorities (4).

Additional suggested recipients included: bodies and organisations such as Ofsted, the Office for Students (OfS) and the Association of Colleges (AoC); college staff; college suppliers and customers; pension funds; trade unions; parents of students; local MPs; governors of schools, Academies or colleges in the area; and local universities.

Four respondents also suggested that notice of an application should be made public through one or more means (such as GOV.UK, college websites, the London Gazette and the Companies House website).

The most common reason provided was that all of these parties would have an interest in the financial and operational matters of the college.

A specific proposal was that any persons who had given notice to the ANA under section 13 of the 2017 Act of their wish to enforce security should be notified. This would mean that where a party considering a normal insolvency procedure (or a fixed charge receivership) had given such notice to the ANA, they would receive notice of an education administration application.

Government response

Section 18(2) of the Technical and Further Education Act 2017 states that the ANA must give notice of an application (a) to the further education body to which the application relates, and (b) to any person specified in education administration rules.

The Insolvency (England and Wales) Rules 2016, on which the rules for an education administration will be based, already specify a number of recipients (in Rules 3.8 and 3.9) in the case of a normal administration. However, respondents to this question suggested a wide range of additional potential recipients - much wider than the parties that would receive notice of a normal administration application. We agree that many of these parties will be interested in a situation where a college is facing insolvency, but an education administration application may not result in an insolvency – the application may not succeed. We are concerned that a formal notification to a large number of parties at that early stage would create unnecessary uncertainty and anxiety, and would risk causing further detriment to the college during the period before the court hearing.

> *"Extending notification of the application to a wide range of parties who have no direct control over the governance of the college would hamper the expediency of the process and have a detrimental financial impact in terms of the cost and undermine the process."* [A respondent]

We require a careful balance between notifying those who need to know, and ensuring (as far as possible) that the learner protection objective is supported as much as possible and is not potentially jeopardised in the period leading up to any education administration order. For this reason, we have decided that the parties specified to receive notice of an education administration in the relevant secondary legislation will be consistent with those specified in Rules 3.8 and 3.9 of the Insolvency (England and Wales) Rules 2016, modified as appropriate to apply to FE bodies. We have also concluded that any persons who have given notice to the ANA in accordance with sections 9 to 13 of the 2017 Act should also be specified to receive notice of an education administration application.

Question 2b

Who do you believe should be specified to receive notice of an education administrator's appointment? Please provide justification for your answers.

A total of 19 respondents provided comments on this question. The most common suggestions for recipients (with numbers of responses in parentheses) were: the FE body (8); creditors (6); existing students (5); the relevant Local Authority/Combined Authority/Mayoral Combined Authority (5); funding bodies (3); the registrar of companies (3); the governing bodies of any college, maintained school or Academy with a sixth form in the same LA area (3); universities in the area (3); the local MP (3); any other MP whose constituents may be affected (3); Ofsted (3); OfS (3); and AoC (3).

Additionally, each of the following was suggested once: any person who has commenced other insolvency proceedings; any supervisor of an existing CVA; a fixed charge receiver; former governors of the FE body from the previous three years (due to the requirements of the Company Directors Disqualification Act); parents of students; college staff; recognised trade unions; the college's landlords; suppliers; and college auditors.

Six respondents said they believed that notice should be given to any person with an interest in the college's affairs.

Two recipients said that the education administrator should publish their appointment in the London Gazette and/or on a public website.

Government response

The provisions in existing insolvency legislation that relate to notification of an administration order are Rule 3.27 of the Insolvency (England and Wales) Rules 2016 and paragraph 46 of Schedule B1 to the Insolvency Act 1986.

We intend that the provisions in Rule 3.27, suitably modified, should also apply in an education administration. In particular, Rule 3.27(1), which provides that an administrator's appointment must be gazetted and may be advertised in such other manner as the administrator thinks fit, will allow the education administrator to publicise the appointment appropriately – which can include making an announcement on the college's website and issuing communications to existing students.

Paragraph 46 of Schedule B1 to the Insolvency Act 1986 (as modified by Schedules 3 and 4 of the Technical and Further Education Act 2017) already specifies that the FE body, creditors and the registrar of companies should receive notice of an education administrator's appointment.

Paragraph 46 also specifies that any other 'such persons as may be prescribed' should be notified. The Government has decided that it would be appropriate for the relevant local authority/combined authority/Mayoral combined authority to receive notice and so we intend to specify this in the rules for an education administration.

We do not currently intend to prescribe any further recipients in legislation. College staff, landlords, suppliers and funding bodies who are owed money are likely to be classed as creditors and so will be notified. The education administrator will still have the discretion and ability to give notice of their appointment to any other people or bodies they deem appropriate on a case-by-case basis. Indeed, the education administrator is likely to engage with many if not all of the people and bodies suggested once they are appointed, and so they will receive notice in this way. There is no requirement in normal insolvency legislation to specifically notify former directors who have held office in the previous three years - an administrator will write to these people, as they will have a duty to report on the conduct of such former directors. An education administrator will therefore have a similar duty to report on former governors, so we do not propose to specify former governors in the rules for an education administration.

Question 2c

Who do you believe should be specified to receive a copy of the education administrator's proposals? Please provide justification for your answers.

A total of 20 respondents provided comments on this question. The most common suggestions for recipients (with numbers of responses in parentheses) were: creditors (9); the relevant Local Authority/Combined Authority/Mayoral Combined Authority (9); existing students (7); the college governing body ('members') (6); employees (5); funding bodies (3); and the appropriate national authority (2).

Four respondents stated that the college Principal or CEO should be explicitly specified. Six respondents commented that the proposals should be posted on a public website and/or otherwise made available to those with an interest. Five respondents suggested wider stakeholders (including Ofsted, OfS, AoC and recognised trade unions) should be specified.

Government response

Paragraph 49 of Schedule B1 to the Insolvency Act 1986, as modified by Schedules 3 and 4 of the Technical and Further Education Act 2017, prescribe that the education administrator's proposals should be sent to the registrar of companies, creditors, the appropriate national authority, the relevant Director(s) of Children's Services and any member of the FE body of whose address the education administrator is aware. These provisions will cover the majority of the recipients suggested.

Although there is no explicit power within the 2017 Act to specify further recipients of a copy of the education administrator's proposals, we have considered how they can be made available to others. The proposals will be filed with the registrar of companies, and will become a public document which can be requested by anyone with an interest, including existing students. Additionally, section 246B (use of websites) of the Insolvency Act 1986 applies in relation to the education administration of FE bodies and allows the education administrator to make notices, documents and other information available on a website.

Question 3

Is there any specific information that you would expect the education administrator's proposals to contain? Please provide an explanation for your answer.

A total of 18 respondents provided comments on this question. 11 of these said that the proposals should provide details of how the education administrator proposes to achieve the special objective, and how the education administration is proposed to end. Seven comments said that the proposals should contain some detail of how the education administration will be funded (including any value for money assessments), and five respondents said that there should be some explanation of the impact of the proposals on creditors' interests. Three respondents said that details of any proposed transfer schemes should be included.

Five respondents stated that the proposals should include practical details for existing students, including any impacts on staff, teaching and curriculum, and how any extra costs incurred by students would be handled. A further comment asked whether any equality analysis would be carried out on groups of existing students with protected characteristics.

Two respondents said that the proposals should set out details of the consultations carried out by the education administrator in developing the proposals, and one respondent raised a query as to how the proposals would be approved. Two respondents noted that there is no specified time limit within which the education administrator must send their proposals to specified recipients.

Government response

Rule 3.35 of the Insolvency (England and Wales) Rules 2016 sets out the content of the administrator's proposals, and we would expect these to form the basis of the proposals for an education administration. In particular, Rule 3.35(1)(j) requires the proposals to set out how an administrator envisages that the purpose of an administration will be achieved, and how it is proposed that the administration will end. We therefore expect the proposals to set out how the education administrator will achieve the objective of the education administration, including taking into account existing students with special educational needs and giving consideration to the creditors of the FE body. This would be consistent with the provisions in section 16 ('Objective of education administration') and section 24 ('General functions of education administrator') of the 2017 Act. We would also expect the proposals to contain some details of how the education administration would be funded, although we accept that this may not be fully finalised at the time the proposals are issued.

However, beyond this, we do not want to prescribe particular content or specify consultation with particular stakeholders in secondary legislation, as this could unnecessarily constrain the education administrator (for example by requiring them to spend time and resource consulting with stakeholders who may not have an interest in a particular insolvency case, or by having to develop full details of funding or any transfer scheme at this stage).

Creditor approval of the education administrator's proposals is not required in the case of an education administration – this is a common feature of special administration regimes.

The requirement in Schedule B1 to the Insolvency Act 1986 which places a limit of eight weeks for an administrator to send out their proposals has been omitted in the case of an education administration. This is to allow time to undertake all necessary consultations with stakeholders, but the education administrator is still required (under para 49(5)(a) of Schedule B1) to send out their proposals as soon as reasonably practicable. We have always been clear that the process of education administration should not continue for longer than is necessary and we would expect that the education administrator would take this approach when developing their proposals.

Question 4

Do you have any other comments or views on the process of education administration?

A total of 18 respondents provided comments on this question.

Three respondents said that the education administration process should be as similar to, and closely aligned with, the existing administration process as possible, so that it was understandable and that stakeholders could have confidence in it.

Three respondents provided comments on the proposal to create a pre-approved panel of insolvency practitioners ('IPs'). One said that further guidance would be welcome, and two said that IPs on the list should have an understanding and knowledge of the FE sector. There was also a concern that the process could create a 'closed shop' making it impossible for IPs to be added to the panel in future.

Three respondents raised concerns about the transfer scheme provisions in the 2017 Act, particularly in relation to transfer of secured assets. Specific issues included whether an education administrator could set aside a fixed charge in order to effect a transfer, and the value received for any transfers undertaken. There was also a concern that transfer scheme powers could cause secured creditors to breach their regulatory obligations.

One respondent commented that there should be clear guidance as to how the process will apply in Wales, and one said that a sample timeline would be helpful to give an indication of the duration of an education administration.

One respondent commented that an education administration should also take account of the interests of staff at an insolvent college as well as its students, and one respondent commented that they believed the learner provision protections should also apply to future learners – not just existing ones. They also felt that consideration should also be given to the wider needs of the local economy.

One respondent observed that there are concerns about the effect on recruitment and retention of governors (particularly those with specialist or professional expertise), and the potential liabilities of governors. This comment seemed to be about the regime in general rather than specifically about the process of education administration and is addressed in the response to consultation question 6 on governors' guidance.

Two respondents raised concerns about the effect of a college insolvency on the Local Government Pension Scheme. This comment is relevant to the insolvency regime in general rather than specifically about the process of education administration, and is addressed in the response to consultation question 10.

One respondent questioned whether an existing student (or a parent or guardian of an existing student) would be able to challenge the education administrator's conduct.

One respondent noted that Schedule 4 to the 2017 Act (which modifies Schedule B1 to the Insolvency Act 1986 to apply to an education administration) does not modify the term 'company' to mean 'further education body', whereas other relevant sections of the 2017 Act refer to ‘further education body’ throughout.

Government response

We are aware that the process of education administration is a new concept, and there is understandable interest as to how it will operate in practice. However, there are a number of existing special administration regimes in other sectors, and there is professional knowledge of how they operate in general terms. The rules for an education administration will be based on the Insolvency (England and Wales) Rules 2016, which are established and well understood, and will provide a coherent and comprehensive basis for the education administration process. Although there will be some education-specific provisions, it is fundamentally a special administration regime like others.

We will provide guidance for college governors as to their duties and liabilities under the insolvency regime in advance of the regime coming into force.

The role and functions of the education administrator in an education administration are set out in the 2017 Act. In order to achieve the objective of an education administration, it is important that an education administrator consults with relevant experts whenever specific advice on particular matters is needed. However, it is equally important that an education administrator is not unduly constrained by rules or regulations in carrying out their role, and as such, we believe that decisions around such issues as timings, consultations with stakeholders and wider considerations should be at the discretion of the education administrator.

In relation to the comment about consideration of the wider needs of the local economy, it is important to be clear that although we would expect the education administrator to take into account wider economic factors in considering potential future markets for the college when developing their proposals, the primary purpose of an education administration is to achieve the special objective, which focuses on existing students.

We will be proceeding with our plans to run a procurement exercise to enable the appointment of IPs when required under the new regime. The procurement will be in accordance with the appropriate legislation, policies, procedures and guidance to encourage free and open competition and ensure fairness and value for money. The IPs appointed as education administrators must be licensed, but will not necessarily be experts in the further education sector. Such experience, where it exists, would be noted as part of our procurement exercise, but would not be prioritised over licensed expertise. However, where specific advice on particular matters is needed, the education administrator will consult with relevant experts. This is no different from what happens in a normal administration, where an IP is unlikely to be an expert in the field of a company over which they are appointed.

In response to the comment about whether the IP procurement process would create a ‘closed shop’, we would expect to review the composition of the panel on a regular basis as is normal for such panels, and conduct further procurement rounds when appropriate.

The comments relating to the Local Government Pension Scheme (LGPS) have been addressed in the Government response to question 10.

We have carefully considered the points raised on transfer schemes, particularly concerning secured creditors. Provisions on transfer schemes for an education administration are set out in Section 25 and Schedule 2 of the 2017 Act, allowing the education administrator to transfer property, rights and liabilities without the consent of any person other than the transferee and the ANA. However, the provisions of Schedule B1 of the Insolvency Act 1986 still apply as set out in Schedules 3 and 4 of the 2017 Act, particularly paragraph 71.

We do not have the power to amend the 2017 Act, so we can not make any amendments to the transfer scheme provisions set out within Schedule 2. However, we are satisfied that the provisions of Schedule B1 that are applied in an education administration would require an education administrator to obtain the approval of the court in order to remove the security attached to an asset before transferring it, and furthermore that the asset transfer proposal would need to be first approved by the ANA.

It is right that third parties are unable to object to transfer scheme proposals proceeding. However, we are clear that it is not our intention for security attached to a transferred asset to be treated differently from security in ‘normal’ insolvency, and we believe that the rights of secured creditors, that are part of ‘normal’ insolvency, are preserved. The Secretary of State or the Welsh Ministers (in the case of colleges in Wales) would therefore not approve a proposed transfer scheme that did not take account of those rights. We hope that this statement satisfies the concerns of secured creditors.

The education administrator will only use a transfer scheme if this is necessary to achieve the special objective and, as already stated, the ANA must approve any such scheme before it is made. We believe it may also on occasion be necessary for the terms associated with an asset to be amended on transfer to a new entity but we do not believe this would result in uncommercial terms being imposed on secured creditors – assets would be transferred to other entities that were in a better financial position than the insolvent entity. Although third party agreement is not required for an asset transfer proposal, the education administrator would be unlikely to put forward a proposal for agreement by the ANA without having fully considered with relevant secured creditors the impact that the proposal would have upon their position.

It is also not our intention that a transfer scheme would put a bank or other counterparty in breach of their wider legal requirements. We anticipate that banks will get sufficient notice of the details of the transfer scheme to be able to carry out regulatory obligations before a transfer takes place and it is very unlikely that the education administrator or the ANA would permit a scheme proposal that would breach those regulatory obligations.

Creditors will also have the safeguard of being able to apply to the court to challenge the education administrator on the basis that he is not carrying out his functions in accordance with the special objective or the subsidiary objective relating to achieving the best outcome for creditors as a whole, in accordance with paragraph 74 of Schedule B1 to the Insolvency Act 1986 (as modified by Schedules 3 and 4 of the 2017 Act). Section 28 of the 2017 Act allows that the appropriate national authority may indemnify the education administrator.

Schedule 4 of the 2017 Act modifies Schedule B1 to the Insolvency Act 1986 to apply it to companies conducting a designated further education institution. As these FE bodies are companies, there was no requirement to modify the term ‘company’ in this context.

Question 5

Do you have any comments about how the filing process could work for FE bodies?

A total of 17 responses were received for this question.

Of these responses, eight thought that it was sensible to replicate the process of a normal company insolvency filing as closely as possible by filing documents at Companies House. All eight felt that it was important to maintain the same level of transparency with FE bodies as applied to company insolvency. Of these responses, one suggested that it was also advisable to advertise in the London Gazette in the case of FE body insolvency.

Two respondents raised questions about FE bodies that are exempt charities. One of these said that if exempt charities will not be required to file at Companies House then this would lead to logistical problems for those trying to search for information on insolvent FE bodies. The second respondent questioned whether it was necessary for FE bodies to register at Companies House when they were already registered charities.

One respondent commented that registration at Companies House was not possible as FE bodies are not registered companies. One further respondent misunderstood the process of administration, suggesting that filing any documents at Companies House in the case of an FE body insolvency should only be required after an education administrator has pronounced his proposals.

Four of the respondents raised questions about the practicalities of the filing process. Three of these respondents expressed concerns that forms may be rejected or not recognised at Companies House. One of these respondents suggested that forms should include a prefix for colleges; the other recommended that each FE body has a unique number assigned by Companies House.

Two of the respondents advised that, although creditors and learners should have access to FE insolvency documents, they should also have access to all records filed in relation to FE corporations - for example annual accounts and register of governors. One of those respondents also commented that, as FE corporations will not be registered at Companies House prior to insolvency, it would be prudent for those financial records to be stored with the Department for Education rather than Companies House.

One respondent advocated that an IP should be responsible for the registering of an FE body at Companies House and for the filing of documents. This respondent suggested that information regarding the process of administration for colleges should be provided on the Companies House website, including guidance for colleges. This respondent may have assumed that colleges would be expected to file documents themselves.

Government response

Section 8 of the 2017 Act allows the Secretary of State to make regulations to ensure that there is a workable system for filing and record-keeping for FE bodies that are statutory corporations when they are in an insolvency procedure. (Colleges that are companies will already have a record at Companies House and any insolvency records, including those relating to education administration, will be filed on that record).

The aim of the filing regime is to create a facility for the filing of documents relating to the insolvency of FE bodies, so that information about the insolvency process and its progression is publicly available. Based on the consultation responses we agree that it is prudent that the filing process should replicate the filing process for a company as closely as possible; thus insolvency documents will be filed with the registrar of companies. As suggested in one consultation response, this will include advertising in the London Gazette, where this is a requirement of existing insolvency legislation.

Several respondents to the consultation raised concerns about the logistics of this process. We will continue to work alongside Companies House to create a filing system which allows for the efficient filing of insolvency documents. At the point that an FE body that is a statutory corporation enters a formal insolvency event (including an education administration), the first filing by the IP will require the provision of some basic information to the registrar. This will include the FE body's name, address and the type of establishment. The registrar will then create a file for the FE body in question and generate a number from which to identify the record and further filings. This reference number will be unique to the FE body and will avoid confusion when further filings are made.

We have decided that we will not require FE bodies that are statutory corporations to register or file with Companies House prior to any insolvency proceedings. The intention is to have a filing regime in place once insolvency proceedings start, rather than initiating wholesale registration of these bodies with Companies House.

Regarding concerns about how documents will be filed and by whom, it should be noted that we will again be replicating the process of a normal insolvency as closely as possible. This means that documents relating to an insolvency of an FE body will usually be filed at Companies House by an IP. Governors or college staff will not ordinarily be required to make filings to Companies House themselves and thus will not be required to have knowledge of the forms used by Companies House.

Question 6

What particular aspects or issues would you find it useful for the guidance for governors to cover?

A total of 22 responses were received about this question.

The majority of respondents welcomed the idea of guidance to provide additional clarity to governors on their duties and liabilities. Respondents said that it would be helpful for this guidance to cover all responsibilities of governors, and not just their role in relation to insolvency.

A number of responses, particularly those from the FE sector, suggested an update to the Guide for College Governors published by BIS in 2014. There was also reference to other guidance published by the Charity Commission and the Institute of Directors that were useful for college governors or could act as a template for future guidance. There were some specific areas where respondents identified the need for additional guidance, including the treatment of antecedent transactions[3] and the distinction between executive and non-executive roles.

A view was expressed that, in order to maintain consistency with the regime for corporate insolvency, the FE insolvency regime should extend to include liability for antecedent transactions, and that executive management teams are subject to the Company Directors Disqualification Act 1986 (CDDA) and antecedent transaction provisions in the same way as shadow directors in the corporate insolvency regime.

[3] Transactions entered into by a company in the period prior to its insolvency.

A number of responses highlighted the potential for the introduction of the regime to affect the willingness of some to act as college governors, but there was also recognition that it should help to improve rigour and professionalism of governors. Two responses highlighted that colleges who are at higher risk should consider how they can access independent insolvency practitioner advice as an additional safeguard for the governing body.

Government response

The role that governors play in the UK's education system is a crucial and well established one - they bring a wealth of outside experience and knowledge to the sector and this is something that the Government wants to continue. We recognise the concern raised by a number of respondents that the introduction of the insolvency regime and risk of governor liability, through application of the Insolvency Act 1986 and the CDDA, could potentially cause apprehension on the part of some people wishing to continue with or take up posts as governors. Our aim is for clear guidance to dispel those apprehensions and minimise the risk of good governors leaving their posts.

It is important to note that the duties demanded by good governance are not new as governors of FE and Sixth Form colleges are already subject to important duties and liabilities in their roles as charity trustees. In practice governors who act in line with their duties as charity trustees (including respecting good practice, following proper process, ensuring that they take (and carefully consider) appropriate professional advice before taking key decisions, and recording the basis of such decisions, as well as acting honestly and reasonably), minimise their risk of engaging in conduct that could result in allegations of wrongdoing.

Insolvency proceedings do not automatically result in disqualification proceedings or wrongful trading claims. So long as governors have adequately discharged their duties, then disqualification proceedings and wrongful trading claims would be very unlikely.

It is also important that governors feel supported, and that Government ensures that clear guidance is provided on governors' duties and liabilities to enable them to understand the obligations of their role. We agree with respondents that it would be beneficial to update the College Governance guide (for colleges in England) that was first published by BIS in 2014 and to include guidance for governors on the implications of the insolvency regime as part of that refresh. In her speech[4] to the Association of Colleges Governance Summit in March this year, the Minister of State for Apprenticeships and Skills committed to the introduction of new guidance for governors to ensure that there is clarity about the regulatory expectations of governors as charity trustees. We plan to

[4] https://www.gov.uk/government/speeches/association-of-colleges-governance-summit

produce such guidance, probably in the form of a handbook for governors, ahead of the insolvency regime coming into force, and we plan to supplement this with awareness-raising at stakeholder events across different regions of England.

We plan to include the following in the guidance on insolvency:

- an introduction to insolvency and the different insolvency proceedings that might occur in respect of an FE body and the responsibilities of governors regarding those;
- an explanation of the application of provisions of the Insolvency Act 1986 and the CDDA to college governors – what disqualification, wrongful and fraudulent trading mean;
- how disqualification procedures work and other actions that might be taken against governors;
- how governors' powers might be affected by an insolvency proceeding; and
- how to support better financial management.

It must be noted, however, that we are limited in the level of detailed advice that we can offer to governors and cannot provide legal advice in the guidance. We cannot, for example, define instances of negligence or the basis for personal liability, as sought by some respondents to the consultation. Ultimately, it is a matter for the court to decide on individual cases. However, we would aim, where possible, to provide examples of circumstances that might lead to liabilities and/or disqualification and will look to be helpful on where governors might seek professional advice on this. Where governors are facing the risk of personal liability as part of insolvency proceedings then they should access independent, professional insolvency advice and ensure that they continue to act honestly and reasonably.

Although not specific on dealing with insolvency, there is already wider guidance on good governance available through Government, the AoC, and the Charity Commission that sets out the fiduciary duties on governors. Support is also already available through the Inspiring FE Governance service[5] to help colleges find people with the right skills to join their governing bodies, including chairs of finance committees.

As also set out in the Minister of State for Apprenticeships and Skills' March speech, we are extending investment in leadership and governance development programmes, including working with the Education and Training Foundation on a tiered programme of development for governors to be rolled out later this year. Our intention is that this programme will include support on financial management duties and insolvency.

[5] "Inspiring FE Governance" website

Regarding concerns about antecedent transactions, we confirm that section 6 of the 2017 Act applies Part 4 of the Insolvency Act 1986, which includes sections 213, 214 and 423 of the Insolvency Act 1986, to FE college corporations. Schedules 3 and 4 to the 2017 Act modify sections 238 to 240 and 246 of the Insolvency Act where an FE body is in education administration. We will ensure that guidance produced for governors refers to antecedent transactions.

As we have previously stated, liability can extend to shadow governors and de facto governors, which could include any member of the executive management team of an FE body if they acted as if they were a governor; on the basis that liability should follow the action taken by that person. A person should not avoid liability because they have not been appointed as a governor, or if they were acting as if they were a governor, or if governors were, in practice, following their directions. It would be extremely unusual to see this in a properly run college.

Question 7

Do you have views on how monitoring and intervention can be further improved to identify cases of financial distress and work with those colleges to improve their financial position and avoid insolvency? (Please be clear whether you are responding in relation to colleges in England or colleges in Wales).

A total of 22 responses were received for this question. One respondent declared that their response was in reference to Wales.

Overall, respondents provided positive feedback and there were no suggestions to change the overall structure of the existing monitoring and intervention regime. However, we received a number of suggestions to further improve the process.

It was suggested by two respondents that the Government should focus on gaining particular oversight of the following key financial parameters for all FE bodies, as primary indicators of financial health across the sector:

- Cashflow
- Debt : Income
- Cashflow available for debt service : Debt service

One respondent suggested that this information could be obtained through requesting quarterly reports from FE bodies, which would also assess other financial health indicators such as student enrolment numbers, rising to monthly reports for those already experiencing financial difficulty.

In terms of FE bodies monitoring and reporting on their own financial performance, although this was recommended by one respondent, two other respondents expressed concern that financial health would be measured on the basis of self-assessed data from the FE body. They advised that this may impact on the objectivity of the data and suggested putting in place independent assessors or ensuring that FE bodies have the necessary skills to carry out this function appropriately. It was also suggested that FE bodies should be made aware of the risks of providing flawed data, in terms of available support and potential insolvency.

One respondent also felt that further clarity is required on the role of the ESFA's Transactions Unit and intervention teams, the FE Commissioner and team, and other regulatory oversight bodies (particularly during an independent business review (IBR)), and that the overlap between these functions needs to be managed. Two respondents commented on the need to understand specifically the roles of the ESFA and the FE Commissioner in an intervention or insolvency situation, including: greater clarity on whether they are acting as shadow governors; what their liability is; and what the implications are if a board fails to implement recommendations. Respondents requested further information about the diagnostic assessment tool which was recently developed with the FE Commissioner, so that FE bodies can use the framework to review their own governance and benchmark themselves against risk indicators.

One respondent suggest that there might be a role for Mayoral Combined Authorities (MCAs) working with DfE or ESFA around performance and planning, which will facilitate local strategic discussion and a joined up approach to individual institutions.

In terms of labelling an FE body when they require intervention of any kind, one respondent raised concerns that it could be detrimental to a college's recovery to publish details of their status in early intervention or formal intervention publically. In addition, one respondent said that the designated 'Administered College Status' (which is one possible outcome of formal intervention) could be confused with a college in education administration through the insolvency regime, and therefore further clarity or adjustment to the labelling is required.

In regard to the availability of emergency short term funding, two respondents argued that the process needed to better reflect the immediate cashflow pressures of a college in financial distress. One respondent suggested that although it is essential to carry out an IBR prior to the ANA providing funding, the 6-10 week predicted timescale for this process would be too long for colleges in acute financial distress, and would compromise the ability to protect learner provision during the period that the IBR is taking place.

Two respondents also suggested that engagement with advisors with sector experience was important when completing an IBR, to ensure the process is robust.

It was also highlighted by one respondent that there is a need to work collaboratively across all agencies and bodies to ensure that the same key risks are identified and resolved effectively, without duplication or confusion. Another respondent suggested implementing Memorandum of Understanding (MoU) agreements which are similar to those which already exist between DfE and related bodies.

Finally, five of the respondents stressed the need for clear communication and early engagement as key to successful resolution of financial issues. As well as the ESFA, the FE Commissioner, and college staff, it was felt that this communication should involve pension fund agencies and trade unions. One respondent suggested setting up a whistleblowing service for staff to report any concerns they have on the financial health or governance of their college.

Government response

We welcome the comments around FE bodies reporting on their own financial performance. The ESFA has established a financial reporting project to review the information gathered and how it is used. The principles underpinning the project are that it (i) is beneficial to all, particularly colleges; (ii) improves financial and governance outputs, and (iii) has strong sector engagement. The project will also consider the timing and frequency of information collation and engage with all stakeholders who have expressed an interest in this area.

We also agree that in some cases it may be necessary to have third-party verification of data, but we would expect in the majority of instances that colleges will have the necessary skills to provide accurate data.

We agree that in an insolvency situation, colleges need to understand the roles and responsibilities of government and its agencies and representatives and advisers. We recognise the need for clear communication and engagement with all relevant agencies and bodies to successfully resolve financial issues, and we will consider how best to ensure appropriate and consistent engagement. Respondents asked for further clarity on the roles of the FE Commissioner and that of the ESFA. These roles are closely aligned and both sit within DfE. The ESFA funds education and training, and is also responsible for regulating and assessing the financial health of colleges, intervening where there is risk or evidence of failure. The role of the FE Commissioner is to intervene in colleges that are at risk and recommend actions to mitigate that risk. The FE Commissioner may intervene early, through Diagnostic Assessments, or where the risk is more acute, through Formal Intervention. The FE Commissioner can also advise on restructuring by supporting a Structure and Prospects Appraisal (SPA) in a college, and has a general role in advising the government on the health of FE Colleges as a whole. The Government has published further information on roles of the ESFA, the FE Commissioner, the intervention process and the expected outcomes of a Diagnostic Assessment.[6]

---

[6] "Intervention policy in colleges and expansion of the Further Education Commissioner role" (November 2017)

We note respondents' comments about the ending of Exceptional Financial Support. The Department plans to continue to deal with minor financial issues through the ESFA using in-year budget re-profiling.

There are existing mechanisms in place across Government for making protected disclosures ('whistleblowing')[7].

Question 8

How could ESFA and the FE Commissioner work with and support colleges in England to help them self-identify financial difficulties at an early stage?

A total of 16 responses were received to this question.

Eight respondents suggested that the ESFA and the FE Commissioner should provide training courses and guidance material for governors and senior management of FE bodies to educate them on good financial management, to help them recognise common problems and indicators of financial distress. One respondent felt that governors and staff would also benefit from training around the complex funding structure for FE bodies, and another respondent suggested that all financial training should also be made available for members of the Board.

One respondent suggested that this training could be delivered via AoC and in collaboration with insolvency practitioners to educate the attendees on the new insolvency regime.

In addition to training existing staff, one respondent said that the ESFA and the FE Commissioner play an important role in encouraging FE bodies to employ the appropriate professional staff to support their financial duties and decision-making.

In terms of financial reporting to the ESFA, one respondent suggested that it would be helpful for the ESFA to expand the financial planning and forecasting templates that it currently shares with FE bodies. They suggested that these templates are too brief and would benefit from being more closely modelled on those used by the Transactions Unit, including further information on monthly cash flow forecasting. This would give governors and staff more guidance for carrying out self-assessments and result in more uniform reporting to the ESFA, which can be used to spot the early signs of financial distress.

One respondent provided feedback that the benchmarking reports which ESFA are currently distributing to governors are very helpful and that this practice should be continued.

[7] "Whistleblowing: list of prescribed people and bodies" (1 October 2017)

In addition to helping colleges self-identify their financial difficulties, six of the respondents suggested that regular reporting and inspections (increasing in frequency for colleges already in financial distress) would benefit the monitoring function. One respondent suggested introducing a mid-year update for colleges in financial distress, and another suggested that the ESFA and/or the FE Commissioner could design a diagnostic tool that would generate a level of reporting which is tailored to the individual circumstances of the college.

One respondent also suggested that the ESFA should include obligations in its funding agreements with each FE body which require FE bodies to immediately notify the ESFA if it breaches any of the terms of its credit agreements. It was felt that this would ensure that the ESFA quickly becomes aware of any defaults, which could impact on the continued availability of credit to the FE body.

Finally, four respondents commented that early, consistent and accurate communication will be crucial to implementing these policy changes. Respondents suggested having a lead contact at the ESFA and the FE Commissioner's Office for each college and the ability to access advice without fear of repercussions.

Another respondent suggested that the ESFA or the FE Commissioner host a forum where governors and staff are able to share best practice and seek advice from peers. One respondent also felt that a toolkit could be developed which is similar to that currently available to academies, to help colleges and FE bodies work through different financial situations.

Government response

We have addressed the points on guidance for governors in response to question 6. As was set out in that response, guidance on good governance is already available, as well as assistance through the Inspiring FE Governance service. We are also working with the Education and Training Foundation on a development programme for governors.

The ESFA currently provides financial benchmarking dashboards to college governors, and will continue to consider how to further support governors and senior managers to understand their financial position, including increasing communication, prior to implementation of the insolvency regime.

Respondents suggested that in addition to helping colleges self-identify their financial difficulties, there could be obligations placed on colleges to alert the ESFA if they get into financial difficulty. The ESFA already requires notification from colleges if there is any risk to their solvency, which could include the refusal of credit. There is nothing preventing colleges from expanding on the information provided to ESFA on monthly cash flow forecasting – some colleges already do this routinely.

As mentioned in the Government response to question 7, the financial reporting project being established by ESFA should also be beneficial to colleges looking to strengthen their monitoring of their own financial position.

Question 9

Do you have views on how the Independent Business Review (IBR) process for an FE college should work, and who should be consulted?

A total of 20 responses were received for this question.

In terms of the overall function of an IBR, two respondents commented that an IBR must be undertaken for the benefit of the appropriate national authority who had commissioned it, as well as the FE body, and one respondent commented that each case should be judged on an individual basis, taking into account the size and specialism of the college.

Two respondents agreed that it is advantageous to have a pre-statutory IBR, rather than to engage insolvency proceedings straight away. These respondents also felt that there was an overlap between the IBR process and the existing process of Structure and Prospects Appraisals (SPAs) undertaken by colleges or the FE Commissioner, and it was questioned whether IPs have a strong enough understanding of the structure and legislation surrounding FE colleges and sixth form colleges to lead an IBR.

In terms of the recruitment of an appropriate IP practitioner to carry out the IBR, one respondent felt that the firm conducting the IBR should select who to consult according to the circumstances of the case, and therefore it would not be necessary to create a central list of consultees in legislation. It was also suggested that to minimise the risk of a conflict of interest, an IP practitioner or firm should not repeat IBRs carried out on the same college (whether this is at the request of the college or the ANA).

Three respondents asked for further clarity on who would be responsible for the cost of an IBR. It was suggested that consideration should be given to how the funding process would work to avoid either party getting into difficulty.

Two respondents commented that secured lenders and the relevant local authority or pension scheme should be consulted on the IBR process, prior to the insolvency regime commencing. One respondent suggested that lenders and pension schemes should be given separate reliance on the terms of the IBR.

Four respondents commented on the need to have strong communication channels throughout the IBR process and agreed processes of working with all appropriate stakeholders. These respondents also suggested that all relevant parties should be consulted when an IBR commences to provide vital insight which can contribute to the recovery of the college. This includes pension organisations, trade unions, staff, trustees and creditors, and further peripheral organisations including training and education companies and other colleges. Respondents felt that colleges stood a higher chance of recovery if the relevant parties are consulted early, and this could lead to a quicker removal of the notice of improvement. One respondent also suggested that further guidance should be made available to colleges to cover general advice, useful contacts, templates for business proposals and financial advice, as also described in the responses to question 8.

Finally, respondents requested further clarity in terms of what ‘triggers’ an IBR, who can commission an IBR, and whether it can only be commissioned by an ANA or a governing body. One respondent also suggested that it would be advantageous for terms of reference to be in place, setting out standard elements to the IBR for all stakeholders to agree at the outset.

Government response

The Government agrees that an IBR would usually be undertaken for the benefit of the ANA, as well as the FE body, and that the scope of the IBR should be judged on an individual basis, taking into account the size and specialism of the college. We are currently undertaking scenario planning work which demonstrates the many variables to consider when carrying out an IBR.

The scope of an IBR will depend on the specific situation and terms of reference. We would expect it to include a review of the financial position and forecasts of the college to assess its solvency and financial viability, its funding requirements and an assessment of the strategic options available to the college. We expect that the IBR will result in a conclusion on whether the college can continue under current management (possibly making considerable changes), whether there are realistic non-insolvent restructuring options and whether an insolvency process may be required. Where it is concluded that an insolvency process is required, we would expect a recommendation as to the nature and timing of the insolvency process.

There are no restrictions on who can commission an IBR, but we would expect that it would usually be instigated by a major stakeholder or by a college itself. Consideration needs to be given as to the degree to which findings will be shared with stakeholders, depending on whether a college, creditor or the ANA commissioned the IBR and the terms which were agreed. There is also an expectation that responsibility for the funding of the IBR process and associated fees will rest with whoever commissioned the IBR.

Although administrators and education administrators must be licensed IPs, there is no such requirement for the provider of an IBR, although we expect that the provider would have insolvency experience available to them and so would either be a qualified IP or accountant. We would also expect the provider of an IBR to be professionally independent of the college on which the IBR is being carried out. The process of selection of IPs and/or IBR providers will be carefully considered. However, as previously explained, they will not necessarily be experts in the further education sector, and where specific advice on particular matters is needed, they will consult with relevant experts.

We agree that clarity about communications throughout the period of an IBR will be important, and that ways of working should be agreed between all stakeholders. Further clarity on this and what 'triggers' an IBR will be provided throughout the implementation stages of the new insolvency regime.

Respondents raised concerns that there was an overlap between the IBR process and the existing SPA process undertaken by the FE Commissioner. While an IBR and a SPA may use some of the same information and data on which to base recommendations, they do not overlap in terms of their purpose.

SPAs are part of the intervention toolkit. An SPA should normally be conducted in partnership with the FE Commissioner who provides support to the process.

The Government has recently published updated information[8] on FE Commissioner-led SPAs which will sets out how this process will work.

As previously mentioned in the response to question 6, the Government is currently working to revise the guidance available to college governors, which will include information on insolvency.

Comments in relation to pensions are addressed in the response to consultation question 10.

Question 10

Do you have any further comments on any aspects of our proposals (including our impact or equalities assessments)?

A total of 13 responses were received for this question.

Seven respondents raised the position of pensions and particularly how the local government pension scheme (LGPS) would be impacted by the insolvency regime. Three responses highlighted that the majority of colleges' LGPS funds are in deficit and that colleges, as "scheduled bodies"[9], have no choice about participating in the LGPS. One response noted that colleges that have provided security to LGPSs, under first charge

---

[8] Further Education Commissioner-led Structure and Prospects Appraisals

[9] Bodies specified in Part 1 of Schedule 2 to the Local Government Pension Scheme Regulations 2013

arrangements, may be required to pay lower LGPS deficit contributions (under that fund's 2016 Funding Strategy approach).

Three responses focused on the way the LGPS operates, and that if a college becomes insolvent and the fund is unable to recover the deficit that the college owed, then the liability would fall to other scheme employers. Amongst a variety of points put by respondents, requests were made for:

- the Government to widen the powers of LGPS to ensure protection of the interests of other employers participating in the scheme;
- LGPS administrators to be given similar powers to trustees in private sector defined benefit schemes; and
- the Government guarantee to LGPS Administering Authorities that in the event of the closure of an Academy Trust any outstanding LGPS liabilities will not revert to the fund to be extended to colleges[10].

One respondent requested that where the Secretary of State commissioned an IBR, then the IBR should be made available to the Teachers Pension Scheme (TPS) and the LGPS as key creditors.

Another requested that the secondary legislation does not allow any scope for colleges to enter insolvency and then re-appear 'in a similar guise', leaving behind unpaid liabilities.

There were requests for the treatment of liabilities to be clarified. Linked to this was the question of the nature and priority of different creditors within an education administration and the need to clarify this.

A number of respondents also raised the potential conflict between the special objective of an education administration and the interests of creditors as a whole. How these interests would be balanced and when the education administration will come to an end were key issues raised. There was also concern about the proposed transfer schemes, the impact this could have on secured creditors, the balance between the special objective and the interests of creditors as well as the position of staff moving to a new employer. Issues were raised about equalities considerations, particularly in the context of the learner protection provisions.

Government response

It is important not to overstate the risk of college insolvency. The Government believes that the risk of a college becoming insolvent is very low, particularly given the robust financial monitoring by ESFA and strengthened intervention regime which will be part of

[10] Academies and Local Government Pension Scheme (LGPS) liabilities: parliamentary minute

the new landscape. We envisage that formal insolvency procedures (including education administration) will be tools of last resort.

If there were to be an IBR or college insolvency, then pension schemes will be treated the same as other creditors. The key issue therefore is to ensure that both funds and colleges have the necessary flexibility to manage risks around current deficits and the future accrual of benefits.

Some respondents have suggested that the Government should provide guarantees for colleges in the same way as has been done for academies. It is important to recognise the difference between colleges and academies. Academies are public bodies on the Government's Balance Sheet, and the guarantee is a reflection of that fact. Colleges, on the other hand, have financial and other freedoms to be independent of Government and are therefore classified as private sector. Accordingly, it would not be appropriate for Government to extend a similar guarantee to colleges.

The Ministry of Housing, Communities and Local Government will be consulting later this year on granting extra flexibilities in LGPS rules to enable the parties to better manage pension risk. Nothing will be done to reduce or jeopardise pension benefits already accrued. Similarly, Government has no intention of preventing current or future college employees from accruing further benefits under the LGPS scheme.

The Government's response on the points raised on transfer schemes has been set out in response to question 4 above.

We did not receive any comments on our regulatory impact assessment during the consultation. However, we have made some amendments to the impact assessment, in order to strengthen it and bring some figures up to date. We have increased our central estimate for one-off costs associated with the introduction of the insolvency regime from £11,400 to £39,184. There are also benefits associated with the introduction of the insolvency regime (non monetized).

The costs remain well under the £5m equivalent annual net direct cost to business threshold, and DfE has therefore self-assessed the measure through its internal triage process. The revised assessment is included at Annex B.

As we set out in response to our previous consultation on the FE insolvency regime, it is the duty of the education administrator to carry out their functions so as to achieve the best result for the college's creditors as a whole, so far as is consistent with the special objective. So it is for the education administrator to interpret and achieve that balance in their proposals. Section 16 of the 2017 Act requires the education administrator to safeguard only the interests of existing students (as defined by section 35 of the 2017

Act[11]). The education administrator is not required to safeguard the interests of each existing student individually but to consider the interests of the existing student body as a whole. Having dealt with the interests of learners, creditors' interests would be prioritised in the same way as for an ordinary administration. The education administrator will decide when they have discharged their duties and seek court approval that the education administration can come to an end.

The Government recognises that, as the special objective recognises the interests of learners and creditors but prioritises the former, there are circumstances in which realisations for creditors might be lower than in an ordinary administration (perhaps because the costs of the administration are increased by a need to maintain provision for learners for longer than might be the case in an ordinary administration). This is a common feature of special administration regimes, where it is inherent that there is some special interest which needs to be protected over and above normal insolvency principles.

The special objective applies equally to all existing learners including SEND (Special Educational Needs and Disability) students. In addition, the education administrator is bound by the duties that apply to the college in relation to SEND students as, once appointed, they are responsible for running the college. So, for example, for existing students with disabilities, the education administrator will be under the same obligations as the college in relation to the requirements of the Equality Act 2010. The 2017 Act requires the education administrator to take particular account of the needs of existing students who have special educational needs.

Schedules 3 and 4 of the 2017 Act require copies of an education administrator's proposals to be shared with the director of children's services at local authorities or combined authorities. This is to ensure that Personal Advisers appointed to existing learners who are care leavers are able to support those learners by providing explanation and guidance as well as practical support (if necessary) around making a decision on the proposals put forward by the education administrator.

Section 36 of the 2017 Act replicates section 33J of the Further and Higher Education Act 1992 and ensures that church-owned property, or any other property held by a corporation on trust for educational purposes, is transferred to the trustees of the college if a corporation becomes insolvent, and cannot be used to meet the claims of creditors.

---

[11] An "existing student", in relation to a further education body that is in education administration, means a person who – (a) is a student at the relevant institution when the administration order is made, or (b) has accepted a place on a course at the relevant institution when the administration order is made.

4. Conclusions and next steps

We are grateful to all respondents and contributors for their comments, which will inform our continued work to develop both the secondary legislation required to bring the insolvency regime into force and the wider practical elements of implementing the regime.

The secondary legislation will be introduced when the Parliamentary timetable allows, and our current intention remains that the insolvency regime will be in force in late 2018.

We will work with stakeholders to provide further information and guidance in advance of the regime coming into force.

Annex A: List of organisations that responded to the consultation

- Association of Colleges
- Barclays Bank plc
- Barton Peveril Sixth Form College
- Bath College
- Bolton College
- Catholic Education Service
- Eversheds Sutherland
- Farnborough College of Technology
- A governance consultancy in the FE sector
- Grant Thornton UK LLP
- Greater Manchester Combined Authority
- Greater Manchester Pension Fund
- HM Land Registry
- Hopwood Hall College
- Institute of Chartered Secretaries and Administrators
- KPMG
- Lloyds Banking Group plc
- Local Government Association
- Local Pension Fund Authority
- Michelmores LLP
- NCG Group
- Neath Port Talbot College
- Nottingham College
- Pinsent Masons LLP
- RSM Restructuring Advisory LLP
- South Essex College
- Swindon College
- University and College Union
- UNISON
- And one individual

Annex B: Revised regulatory impact assessment

Regulatory Triage Assessment	
Title of measure	Further Education Insolvency
Lead Department/Agency	DfE
Expected date of implementation	End 2018
Origin	Domestic
Date	17/05/18
Departmental Triage Assessment	Regulation below £5m (final stage)

Rationale for intervention and intended effects

A proportion of Further Education ('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. Area Reviews (supported by funding through the Restructuring Facility (RF)), will reduce the possibility of a 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.

The department consulted on the insolvency policy between 18th December and 12th February. We did not receive any comments on the impact assessment and the assumptions used in the consultation IA remain the same.

The IA remains well under the £5m threshold **for self-certification**[12].

Viable policy options (including alternatives to regulation)

The 2016 Consultation on Developing an Insolvency Regime for the Sector (Further Education and Sixth Form Colleges)[13] (p.13) sets out the rationale for a legislative approach. Although alternative approaches were considered prior to the Bill stage, it was decided that a legislative approach would be most appropriate. This remains relevant for the Statutory Instruments.

When FE colleges were taken out of Local Authority control in 1992, it was not specified whether or how they should be subject to insolvency procedures. The Technical and Further

[12] For measures that are below the £5m threshold, departments (as part of self-certification) should carry out proportionate cost benefit analysis to inform decision-making as well as demonstrating that the business impacts are likely to fall below the £5m EANDCB threshold. Independent scrutiny by the Regulatory Policy Committee is not required.

[13] Consultation on developing an insolvency regime for the FE sector (July 2016)

Education Act 2017 has therefore introduced an insolvency regime for FE and sixth form colleges in order to provide certainty in the event that a college becomes insolvent, to facilitate an orderly process for creditors and to put in place a process that can protect the interests of learners.

The Act applies normal company insolvency law to FE and Sixth Form college corporations. It also sets out provisions for a Special Administration Regime for FE bodies, with the special objective of learner protection. This allows for an insolvent college to be put into a process known as education administration, so that learning provision for existing students at the college can be protected while the financial future of the college is assessed and is resolved (in one of a number of ways). This is collectively referred to here as the FE Insolvency Regime.

Insolvency represents a better value for money approach to dealing with financial failure than the current system. The introduction of the regime will also send an important signal to the sector of the importance of strong and effective financial management. It also gives encouragement that where required colleges should participate in the current opportunities for restructuring to get their college in a financially resilient position while support is still available through the RF.

The insolvency regime for colleges should be in force by end of 2018 following introduction of 2 statutory instruments.

Initial assessment of impact on business

The regime provides certainty in the event that a college becomes insolvent, to facilitate an orderly process for creditors and to put in place a process that can protect the interests of learners. The Insolvency SIs will place little additional regulatory duty or burden on FE colleges.

The central estimate for business NPV is -£39,184

The central estimate for the EANDCB[14] is £4,552

Costs to business:[15]

There will be some one-off costs, particularly legal costs, associated with FE colleges who could meet the current triggers for a notice to improve for financial health, familiarising themselves with the insolvency regime regulations once they come into force. FE colleges deliver on average 20% of their business as privately funded education[16]. We have estimated

[14] Equivalent Annual Net Direct Cost to Business.

[15] All costs and benefits are in 2018/19 prices.

[16] DfE analysis of FE College accounts 2013/14.

these one-off costs would amount to a total of £142,695 for the public and private funded parts of FE colleges in the "most likely" scenario / central estimate. The central estimate 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. However only the private funded part is in scope for better regulations[17] for which the costs are **£28,539.**

As this figure is subject to change depending on policy change, financial triggers and college performance, we have done some sensitivity analysis and currently estimate that in a "low case scenario" 80 colleges would need to familiarise themselves with the SIs.[18] We estimate that in a "worst case scenario" 150 colleges need to familiarise themselves with the SIs. In a "low case" scenario the costs for the private funded part are £22,679 and in a "worst case" scenario the costs for the private funded part are £40,975.

There will also be one-off costs relating to <u>all colleges gaining a high level understanding of the insolvency regime</u>. We estimate this to be £53,200 for the private and public funded parts of the colleges. Apportioning this to the private funded part amounts to **£10,645.**

Therefore the **total costs** of gaining a high level understanding of insolvency for all colleges and familiarising with the regulations by FE colleges who could meet the current triggers for a notice to improve for financial health is **£39,184** ("most likely" scenario / central estimate).

This analysis is based on a number of assumptions given the lack of robust impact evidence. Therefore, the central estimate of cost represents a most-likely scenario, rather than a forecast. However, our sensitivity analysis shows that even in the most extreme scenarios, the costs to private funded part of the business are well below £5m. It would not be proportionate to undertake further analysis given the lack of evidence and the likely size of the impacts.

<u>Calculations and assumptions</u>

The costs calculation below is split into two sections:

1. The total cost of familiarisation to FE colleges who could meet the current triggers for a notice to improve for financial health
2. The total cost of familiarisation to all FE colleges

[17] Further Education Bodies operate a mix of privately-funded and publicly-funded services: in these cases a 'public sector carve out' applies and we calculate the impact of new regulation on these organisations on a pro-rata basis.

[18] Sensitivity analysis is a technique to assess how responsive the estimated costs and benefits of a policy are to changing the assumptions underpinning the analysis. The low, central and high cost scenarios do not represent DfE or ESFA thresholds for financial health assessments.

1 FE colleges who could meet the current triggers for a notice to improve for financial health, familiarising themselves with the insolvency regime regulations (central estimate: £28,539)

Note: *We would expect instances of college insolvency to be exceptional and uncommon. The figures used here are simply estimates (solely for the purposes of this impact assessment) of the numbers of colleges which may need to familiarise themselves with the new regime, and are not any sort of estimate or forecast of the numbers of colleges which may be at risk of insolvency.*

Number of colleges in scope in England:

There are currently 37 colleges that have a published notice to improve for financial health. We estimate using today's assumptions that over the first 10 years of the policy an additional 63 colleges could meet the current triggers for a Notice. In the subsequent six years an additional 51 colleges may become in scope for intervention (using inadequate as a proxy as per current modelling assumptions). An additional 12 colleges may become in scope of a notice over the following three years (estimated based on current assumptions). Therefore a total of 100 colleges is estimated to be the "most likely" / central scenario. We would expect that these colleges would need to ensure they were familiar with the insolvency regime procedures. Specifically they would need to know the details of the regulations. As a central estimate, we believe that 100 colleges will need to fully familiarise themselves with the insolvency procedures.

As this figure is subject to change depending on policy change, financial triggers and college performance, we have done some sensitivity analysis and currently estimate that in a "low case scenario" 80 colleges would need to familiarise themselves with the SIs. We estimate that in a "worst case scenario" 150 colleges need to familiarise themselves with the SIs.

The number of colleges needing to familiarise themselves with the regulations is the key cost driver for this policy, but our analysis shows that under all scenarios, the costs to business are very likely to fall below the £5m threshold.

Number of colleges in scope in Wales:

Currently there are no colleges at increased financial risk in Wales. The Welsh Government (WG) are currently implementing a programme of institutional review, with a particular focus on FE resilience, and are not anticipating any FE colleges being at increased financial risk over the next 10 years. However, should a college face financial issues, the WG would encourage a merger, rather than go down the route of insolvency. This course of action has allowed colleges to stabilise in the past.

Hourly rate and number of hours needed:

FE colleges are likely to engage a private sector legal firm for this. Legal costs for insolvency are close to accountancy firms' rates for insolvency. We have estimated costs based on published information for Austin Reed Insolvency (Alix Partners) (2016)[19] and JE Beale Plc Insolvency (KPMG) (2016)[20].

We assume that 3 hours will be needed to research the SIs by the legal firm. We assume that 1 further hour is then needed for the partner of the legal firm to have a briefing meeting with the governors of the FE college. These assumptions are based on the size of the SIs and the estimated time needed to read them. We have sense checked these assumptions with an industry expert. We have had no negative responses at consultation, which suggests our estimate of cost is sensible.

The cost per college in financial difficulty is calculated in the following way: 1h meeting between partner and governors at £450 per hour + 1h research by partner at £450 per hour + 2h research by solicitor at £300 per hour = £1,500 per college (in 2016/17 prices). In 2018/19 prices, this is equivalent to **£1,546**.

We have not monetised the cost for the governors' 1 h meeting with the partner of the legal firm in this Impact Assessment as it does not represent an opportunity cost. This is because we consider that familiarisation with key developments is a 'business as usual' activity that governors would expect to undertake in the normal course of business. Furthermore the majority of FE governors are volunteers/unsalaried.

To calculate the total cost to business, we use the following formula:

Cost = cost per college × number of colleges × privately funded part of colleges

The average proportion of colleges' business that is privately funded is 20% (see footnote 2). These costs are discounted to 2018/19 in line with HM Treasury Green Book guidance[21].

Low case scenario (80 FE colleges):

80 colleges over ten years (37 in the first year, 43 in years 2-10).

Total cost (discounted over ten years): **£113,396**

Total cost to business (discounted over ten years): **£22,679**

Central / "most likely" scenario (100 FE colleges):

100 colleges over ten years (37 in the first year, 51 in years 2-7, 12 in years 8-10).

[19] Austin Reed insolvency from proposals filed at Companies House (page 129)

[20] J E Beale Proposed Voluntary Arrangement (page 59)

[21] HMT Green Book. Discounting refers to a process used to compare costs and benefits occurring at different points in time.

Total cost (discounted over ten years): **£142,695**

Total cost to business (discounted over ten years): **£28,539**

Worst case scenario (150 FE colleges):

150 colleges over ten years (37 in the first year, 113 in years 2-10).

Total cost (discounted over ten years): **£204,874**

Total cost to business (discounted over ten years): **£40,975**

2 All colleges gaining a high level of understanding of the insolvency regime (central estimate: £10,645)

Number of colleges in scope

Finally, all colleges will need to gain a high level understanding of the insolvency regime through reading the circular on FE insolvency prepared by legal firms and reading the governor guidance. There are currently 269 colleges in England and a further 14 further education colleges in Wales as of April 2018[22]. Total number of colleges in scope is 283.

Hourly rate and number of hours needed

The Further Education Workforce Data for England[23] (published June 2017) cites the 2015-16 average salaries for senior managers in colleges as £73,992. In 2018/19 prices, this is equivalent to £77,928.

Assuming a 25.5%[24] (Eurostat, 2016) uplift, and a forty-hour work week, the hourly wage equivalent would be:

$$\frac{£77{,}928 \times 1.255}{52 \times 40} = \boldsymbol{£47.02\ per\ hour}$$

We estimate that 2h are needed for reading by 2 senior leaders (principal and head of finance) in each FE college. This represents a possible scenario, rather than a concrete forecast – however, this is a conservative assumption as most colleges in good financial health are unlikely to spend two hours reviewing the new guidance.

Calculation of total cost

We calculate the total cost with the following formula:

[22] Association of Colleges: "Key Further Education Statistics"

[23] Education and Training Foundation: analysis of workforce data from the Staff Individualised Record (SIR) dataset for Further Education (FE) providers in England in 2016-17

[24] Eurostat Labour Costs database

Cost = number of colleges × number of senior leaders x hours needed x hourly salary x private funded part

If two senior leaders in each of the 283 colleges in England spend two hours reading and discussing the new regulations, the total cost is

$$£47.02 \times 2 \times 2 \times 283 = £\mathbf{53,225}$$

Assuming that 20% of private funded part (see footnote 2), the total cost to business would be **£10,645**.

TOTAL COST (central estimate) = £10,645 + £28,539 = £39,184

(Low estimate = £33,324, High estimate = £51,620)

Benefits to business:

There may be benefits to colleges to the introduction of the insolvency regime:

1. The insolvency regime will provide a strong incentive for colleges to improve the day to day financial management of FE and sixth form colleges and therefore improve their financial health. As the steps each college will take to improve its financial management / financial health will vary depending on their individual circumstances, it is not proportionate to quantify the benefits derived from this.

2. It will incentivise colleges to make tough decisions and restructure when it is required to improve financial stability. Again it is not proportionate to quantify this as this will vary from college to college.

3. Should a college become insolvent the FE insolvency regime will enable insolvency to be dealt with in a much quicker, efficient and effective way than is the case with the current arrangement. This is likely to save time and money. It is however not possible to quantify this as it will depend on the individual circumstances.

Attempting to monetise these benefits would be disproportionate to the cost of the policy.

Total impact on business:

The total net present value to business represents the total, discounted burden on business over the life of the policy.

Total NPV to business: -£39,184

The EANDCB is the equivalent annual net direct cost to business. It is calculated by dividing the net present cost to business[25] (**£39,184**) by the annuity rate for the appraisal period (**8.61**). This represents the annualised additional burden of the regulations on business. **Total EANDCB: £4,552**
BIT status/score n/a
Rationale for Triage rating The costs for the "central", "medium case" and "worst case" scenarios all fall well below the new £5,000,000 threshold and therefore the regulatory change qualifies for self-certification".

[25] Net present value = present value benefits – present value costs.

About this publication:
enquiries www.education.gov.uk/contactus
download www.gov.uk/government/consultations

Reference: DFE-00182-2018