



Department  
for Education

# **Further education bodies: insolvency guidance**

**January 2019**

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## Foreword

The further education sector transforms the lives of many in our society. No college can do that without the dedication and support of their governing bodies, and I would like to thank you for all that you do. The work that you undertake as governors is vitally important and much appreciated.

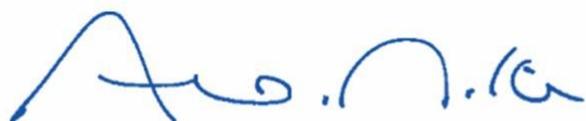
You will know that well-managed further education and sixth form colleges help improve productivity locally and nationally, something that will be increasingly important in the future. Area reviews have made a significant contribution towards creating strong and financially resilient colleges. Nevertheless, we also have to be prepared to respond appropriately and effectively if colleges fail financially in future, however small that chance might be.

The introduction of new insolvency legislation makes it clear how colleges will be managed if they become insolvent, protecting existing learners first and foremost. It will be part of the future intervention framework, allowing colleges to exit the market when appropriate and without unnecessary disadvantage to learners, creditors and taxpayers. This provides clarity to those in the sector as to what would happen in the future if individual colleges should fail. Above all, it affords learners in the sector a special degree of protection.

The legislation is due to come into force on 31 January 2019. However, that does not mean that a formal insolvency process is the only option when a college is in financial difficulty. If you believe that there may be financial problems ahead, the ESFA are keen to help you to resolve issues early. Their contact details are at the [back of this guidance](#).

Now is the time for senior college staff and governors to familiarise themselves with the legislation and make sure they are sufficiently focused on in-year as well as long term financial management.

This guidance sets out how the new insolvency regime for the sector works. It is particularly aimed at governors, but we hope it will be equally useful for college finance directors and other senior staff. I recommend all college leaders and governors make use of it, as both a supplement to the Department's wider guide on good governance and as a guide to the legislation.



**The Rt Hon Anne Milton MP**

**Minister of State for Apprenticeships and Skills**

# Summary

## Who is this publication for?

This publication is for governors of further education (FE) and sixth form college corporations in England and governors of designated institutions conducted by companies and the directors of those companies. It will also be useful for corporation clerks, college finance directors, other senior college staff and those with an interest in governance.

While all governors should familiarise themselves with the legislation and the guidance, many will find the first part of this guidance most beneficial in general. The second part, specific to the legislation, would be most relevant in an insolvency situation.

The guidance has been developed by the Department for Education (DfE), the principal regulator and sponsor department of FE and sixth form colleges. DfE officials have worked with the Association of Colleges (AoC) and Sixth Form Colleges Association (SFCA) in developing the regime. Both organisations are happy to signpost people who wish to know more to other sources of advice.

## Main points

This guidance serves two main purposes.

Firstly, it provides general guidance on how to reduce the risk of insolvency through good financial management, including guidance on reducing risk of liability to governors and providing links to financial management guides and training. It also reminds governors of their existing financial duties as charity trustees, specifically in the context of responsible director conduct required in insolvency. It sets out in one place information for governors of FE bodies about their obligations under insolvency law as it is applied to FE bodies.

Secondly, it sets out technical information which provides:

- An introduction to insolvency and the different insolvency proceedings that might occur in respect of an FE body and the roles and responsibilities of governors regarding those.
- An explanation of the application of certain provisions of the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 to college governors – including what disqualification, wrongful and fraudulent trading mean and what actions might be taken against governors.

It also provides information on where governors can seek further advice.

It does not provide general wider guidance on good college governance, which is covered in the [Further education corporations and sixth form college corporations:](#)

[governance guide](#)<sup>1</sup>, published in November 2018. The governance guide has been produced to support good governance of FE and sixth form college corporations and provides guidance on the legal and regulatory requirements and recommended practice that apply to FE and sixth-form college corporations.

It does not provide comprehensive guidance on the financial monitoring and intervention arrangements for colleges, which are being redeveloped in the light of the introduction of the insolvency regime. More details will be published later in the spring of 2019.

## **Review date**

This guidance will be reviewed at least annually. If you have this guidance in a saved, offline or hard copy format, you are advised to check on GOV.UK to ensure that you are using the most up-to-date version of the guidance.

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<sup>1</sup> <https://www.gov.uk/guidance/fe-governance>

## Introduction

For any insolvency regime to be credible, it must require directors of companies, trustees of charities, and, specifically in this case, governors of college corporations to be accountable for their actions and decisions.

This is a key component of insolvency that aims to protect creditors and to maintain the integrity of the business environment. Creditor protection is important to retain lender and supplier confidence, so in line with other insolvency regimes, the FE insolvency regime includes similar protections for those who deal with the FE sector.

Governors have duties as charity trustees to, amongst other things, ensure good financial management of college corporations. Those duties are all the more important in the event that a college corporation encounters financial difficulty that could result in financial crisis and insolvency.

A company (or other organisation) is insolvent when it cannot pay its debts<sup>2</sup>. This could mean:

- it can't pay bills when they become due
- it has more liabilities than assets on its balance sheet

Governors have obligations to act to ensure that they do not allow the college corporation or company to continue to trade when insolvent if this damages the interests of creditors. The deterrent and incentive effects of the regime should ensure that FE bodies are run in a financially prudent way to protect creditors, staff and students, as well as taxpayers' money.

This publication provides general information only and is not exhaustive. We have made every effort to ensure that the information is accurate, but it is not a full and authoritative statement of the law and you should not rely on it as such. The Department for Education cannot accept any responsibility for any errors or omissions as a result of negligence or otherwise.

This guidance is not a substitute for professional advice relating to the specific nature or circumstances of any particular college corporation or company.

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<sup>2</sup> <https://www.gov.uk/government/publications/options-when-a-company-is-insolvent/options-when-a-company-is-insolvent>

## Summary of key points

### Financial management and performance

- The board and executive should recognise that the monthly cashflow position is as important as the year-end position and that insolvency can develop quickly.
- The board should ensure that the college executive undertake robust and comprehensive monthly cashflow forecasting and, where appropriate, ensure this is reviewed externally/independently.
- The board should undertake regular monitoring and review of both cashflow and loan covenant compliance.
- To ensure strong financial management, the board should ensure that its makeup includes good finance skills and that there is an effective finance committee. There should be a credible, professionally qualified finance director appointed with sufficient seniority within the college (preferably a senior post-holder).
- The board should ensure that there is adequate risk assessment and sensitising of key cash variables, in particular capital receipts and Adult Education Budget clawback.
- The board should not rely solely on the Education and Skills Funding Agency (ESFA) or other review ratings to give an indication of solvency, which may either not fully reflect the college's true financial position or may not be up to date.

### Insolvency technical points

- Although instances of insolvency may be rare, the board and executive should familiarise themselves with this guidance and seek appropriate advice as necessary.
- The board should be aware of their role during an independent business review and during an insolvency procedure such as education administration (under the control of the appointed licensed insolvency practitioner).
- Only the Secretary of State can apply to court for an education administration order in relation to a further education body in England.
- Disqualification can apply to appointed governors, and also to people who are acting as a governor although not formally appointed as one. It is important to recognise that company directors are not disqualified as an automatic consequence of the insolvency of a company, and this will also be the case with governors or senior management of colleges. Disqualification proceedings are only commenced where there is evidence of wrongdoing, which could include fraudulent and wrongful trading, which is fully investigated.
- Not all offences and penalties apply to student governors, although they could still be found liable for serious offences such as fraud.

## Key Terms

In this guidance:

**‘Governor’** means a member of the board of the corporation. A governor is also a charity trustee within the terms of the Charities Act 2011.

**‘student governor’** means a member of the board of the corporation who is or was a student at the statutory corporation at the time during which that person is or was a member.

**‘Board’** - responsible for the governance of the corporation. It consists of governors who have been duly appointed and are entitled to vote. It does not include the clerk or anyone who may attend board meetings in an advisory or other capacity.

**‘Statutory corporation’** is a corporate body created by an act of Parliament or Royal Charter.

**‘FE body’** means a further education corporation or a sixth form college corporation in England, or a company conducting a designated further education institution in England (designated under the Further and Higher Education Act 1992); as defined in s.4 of the Technical and Further Education Act 2017.

**‘must’** is used where there is a legal or regulatory requirement or duty with which governors must comply.

**‘should’** is good practice that you are advised to follow unless there is a considered and recorded reason for not doing so.

**‘existing insolvency procedures’** means procedures such as administration and liquidation that already apply to companies and other organisations under existing insolvency law (principally the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016).

**‘normal administration’** means administration that already applies to companies and other organisations under existing insolvency law and that applies to FE and sixth form statutory corporations through the provisions of the Technical and Further Education Act 2017 – we have adopted this term to distinguish ‘administration’ from ‘education administration’.

**‘the Gazette’** means the [official journal of record](http://www.thegazette.co.uk/)<sup>3</sup> which includes the London Gazette and is a publication consisting of statutory notices where there is a legal requirement on

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<sup>3</sup> [www.thegazette.co.uk/](http://www.thegazette.co.uk/)

the notice placar to advertise an event or proposal in The Gazette. It is used as standard in insolvency and company law.

A 'liability' is a sum of money (a debt) or some other indirectly financial obligation which is due to another person. Directors may incur personal liability, both civil and criminal, for their acts or omissions in directing the company.

A **Company Voluntary Arrangement (CVA)** is an arrangement between a college and its creditors that may, subject to creditor approval, compromise creditors' debts and thereby allow the college to avoid liquidation.

**Administration** is a rescue procedure that provides for a number of possible outcomes: the college could be reorganised (including via a CVA – see above), it could be transferred as a going concern in its entirety or in part, or the administrator could wind the college up. It should be noted that this is a separate process to the special administration regime of education administration that we are implementing.

**Creditors' Voluntary Liquidation (CVL)** will be a procedure instigated by an insolvent college, whereby the college members (governing body) voluntarily bring the business to an end by appointing a liquidator (a liquidator may also be appointed by creditors). The assets of the insolvent college are sold, and the proceeds are distributed to the creditors.

**Compulsory Liquidation** is where the court is petitioned to wind up the college and then may make an order for winding up and appointing a liquidator. There could be a number of possible applicants, including the college itself – but we would expect (as is currently the case in most cases of compulsory liquidation of companies) that the petitioner will be a creditor for an unpaid debt.

**Receivership** will only apply in terms of fixed charge receivership, as FE bodies are unable to create floating charges. Those creditors with fixed charges will continue to be able to appoint a receiver, but any such appointment will be subject to the Secretary of State's power to apply for an education administration order; in the event that the court were to make such an education administration order, any receiver would be required to vacate office.

## List of legislation referred to within this document

[Insolvency Act 1986](#)<sup>4</sup>

[Company Directors Disqualification Act 1986](#)<sup>5</sup>

[Further and Higher Education Act 1992](#)<sup>6</sup>

[Companies Act 2006](#)<sup>7</sup>

[Charities Act 2011](#)<sup>8</sup>

[The Insolvency \(England and Wales\) Rules 2016](#)<sup>9</sup>

[Technical and Further Education Act 2017](#)<sup>10</sup>

[The Education Administration Rules 2018](#)<sup>11</sup>

Further Education Bodies (Insolvency) Regulations 2019

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<sup>4</sup> <https://www.legislation.gov.uk/ukpga/1986/45/contents>

<sup>5</sup> <https://www.legislation.gov.uk/ukpga/1986/46/contents>

<sup>6</sup> <https://www.legislation.gov.uk/ukpga/1992/13/contents>

<sup>7</sup> <https://www.legislation.gov.uk/ukpga/2006/46/contents>

<sup>8</sup> <https://www.legislation.gov.uk/ukpga/2011/25/contents>

<sup>9</sup> <https://www.legislation.gov.uk/uksi/2016/1024/contents/made>

<sup>10</sup> <https://www.legislation.gov.uk/ukpga/2017/19/contents>

<sup>11</sup> <https://www.legislation.gov.uk/uksi/2018/1135/contents/made>

## Duties of governors of statutory corporations

College governors come from a diverse range of backgrounds and bring different skills to the boards of FE and sixth form colleges; and we recognise that not all will have financial expertise.

The governing body as a whole needs to ensure that within its membership it has the skills necessary to discharge its core functions. If it is lacking in a particular area the body as a whole should seek to address that as appropriate, for example through alternative appointments and/or training.

Individual governors are required to have full regard to their duties as charity trustees under charity law. This will include questioning the financial position of the college where this is unclear, requesting advice and explanation as necessary, and to take action with the college principal and senior staff, if they recognise that the college is at risk of insolvency.

Only selected charity trustee duties are set out below in this guidance; these are most pertinent to good financial management and avoiding insolvency. Understanding and managing the financial health of the college is a vital part of governors' compliance with their existing legal duties as charity trustees to:

- act in the interests of the college as a charity and its beneficiaries;
- protect and safeguard the assets of the college as a charity; and
- act with reasonable care and skill.

The wider list of governors' duties are set out in greater detail in the '[Further education corporations and sixth form college corporations: governance guide](#)'<sup>12</sup>, which should be read alongside this guidance.

Duties related to good financial management include (but are not limited to):

- The duty to manage your corporation's resources responsibly. As charity trustees, governors must:
  - Make sure the corporation's assets are only used to support or carry out its purposes
  - Avoid exposing the corporation's assets, beneficiaries or reputation to undue risk
  - Not over-commit the corporation
  - Take care when investing or borrowing

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<sup>12</sup> <https://www.gov.uk/guidance/fe-governance>

- Comply with any restrictions on spending funds or selling land, premises or other assets
  - Ensure effective and efficient use of resources
- Acting with reasonable care and skill. Governors must take reasonable care in governing the corporation, make best make use of skills and experience and take appropriate advice when necessary.
- Ensuring the corporation is accountable. Governors must comply with accounting and reporting requirements.

When delegating, governors need to remember that they cannot delegate overall responsibility and governors remain collectively responsible for all decisions that are made and actions that are taken with their authority. High risk and unusual decisions should not be delegated.

# Adopting best practice and reducing risk of insolvency

## Good financial management within FE bodies

Since all governors have a shared responsibility for the strong financial management of their college, they cannot simply rely on the governors on the board who have professional financial expertise to focus on overall financial health.

All governors need to ensure that the college's executive team has a sharp focus on:

- robust and comprehensive cashflow forecasting – where appropriate reviewed externally/independently; and
- cash reserves being sustainably maintained throughout the year (not just at year-end)

All governors should collectively ensure:

- regular monitoring and review of monthly cashflow, overdraft usage and loan covenant compliance (with good finance skills and an effective finance committee in place)
- adequate risk assessment and sensitising of key cash variables, in particular capital receipts and funding clawback
- that they, the Principal and Finance Director recognise and understand the implications of the insolvency regime and all stages of intervention so that they can work most effectively with the ESFA and the FE Commissioner (FEC) and his team

College corporation boards should not limit their financial focus, for example prioritising year-end or even quarterly positions; but need to regularly monitor the college's monthly cashflow position. They should seek regular assurance on the cash reserve position, and up to date forecasts that extend beyond the end of the current financial year.

Boards should try to identify any breaches or potential breaches of loan covenants in-year rather than after year-end. Renegotiation of loan covenant terms is easier when changes in position are identified and addressed quickly. Conversely, if not identified, breaches can result in reclassification of debt to current liabilities and accelerate a decline in financial health.

College corporations would be advised to recruit a qualified accountant onto their board; and/or to ensure that a Finance Director of sufficient seniority is appointed, who is capable of renegotiating covenants and lending facilities and driving through change where needed. Boards also need to ensure good risk assessment of financial plans and delivery, along with actions to mitigate risk, and monitoring and reporting regularly.

## Financial planning training and guidance

Those governors that do not have a background in finance are not expected to become experts. However, they should familiarise themselves with financial planning and accounting guidance; undertake training if required; ask questions and seek adequate explanation and advice when finance papers are presented to them.

Financial reporting requirements, 'College accounts direction', and the 'College financial planning handbook' are produced and updated by the ESFA and are available from [GOV.UK](https://www.gov.uk)<sup>13</sup>.

The AoC also publishes [guides](#)<sup>14</sup> on financial management, including the Accounts Direction Handbook. This site also includes example accounts to assist Governors and college staff.

The AoC also provides information on their website for a variety of training programmes, including finance training as part of the [Education and Training Foundation Governance Training Programme](#)<sup>15</sup>.

[Inspiring FE Governance](#)<sup>16</sup> can help colleges to find people with the right skills to join their governing bodies, including chairs of finance committees.

The SFCFA offers training and advice to governors of sixth form colleges, as set out in the governance handbook and the [training summary](#)<sup>17</sup> available on their website.

## Early identification and intervention

Governors should ensure that as soon as signs of financial difficulty emerge – either as an immediate issue or anticipated risk identified on the horizon – that the college liaises with their bank and the ESFA, as appropriate.

Exceptional Financial Support will no longer be available from April 2019, but a range of support will continue to be available from the ESFA and the FEC's team. It will be more straightforward to identify appropriate support and intervention if colleges tell the ESFA immediately if they judge that they may be running into difficulties.

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<sup>13</sup> [www.gov.uk/government/publications/college-accounts-direction](https://www.gov.uk/government/publications/college-accounts-direction)

<sup>14</sup> <https://www.aoc.co.uk/funding-and-corporate-services/funding-and-finance/accounting-and-financial-planning>

<sup>15</sup> [www.aoc.co.uk/funding-and-corporate-services/governance/governors/training-materials-governors](https://www.aoc.co.uk/funding-and-corporate-services/governance/governors/training-materials-governors)

<sup>16</sup> <https://inspiringfegovernance.org>

<sup>17</sup> <https://sfcawebsite.s3.amazonaws.com/uploads/document/22575-Sixth-Form-Colleges-Association-College-Governance-Network-Flyer-P13.pdf?t=1548321809?ts=1548321809>

The ESFA will strengthen its approach to early intervention action, and the FEC and his team will work closely with colleges on improving their performance.

Governors should be careful not to rely solely on good or satisfactory ESFA or other review ratings as an indication of solvency. Such ratings do not necessarily take into account all aspects of financial management and the cashflow position can vary quickly and should be assessed monthly.

## **Independent business review (IBR)**

Prior to a corporate insolvency, it is not unusual for creditors to commission an independent business review (IBR) of the organisation or company to assess the options available and the strategy ahead of formal insolvency proceedings starting. We plan to take a similar approach in cases of insolvency of college statutory corporations.

Some lending banks already commission IBRs of colleges as part of their normal course of business. In future, Government may also commission IBRs now that Restructuring Facility funding is no longer available.

An IBR is usually commissioned by a key stakeholder (e.g. a lending bank or material funder) where an undertaking is either exhibiting signs of financial distress, has breached covenants on financing facilities or where there is a material additional financing need caused by operational difficulties.

An IBR does not automatically result in insolvency proceedings of any kind – and the earlier it is conducted, the wider the range of potential viable solutions that can be identified for the future of the college.

The earlier the engagement is started, the more likely that parties can work together through an IBR, to determine the best outcome for the future of the college. In an ideal situation, an IBR would be conducted well in advance of potential insolvency proceedings beginning, to allow time for issues to be identified and addressed where possible; to avoid reaching that critical point. If conducted early enough, IBRs can help to head off insolvency situations, or at least make them less complicated to implement. This is because they will probably be able to identify a wider range of options.

However, it is possible that a short IBR might still be conducted if a college has reached crisis point, to inform an assessment of whether to proceed with an insolvency procedure and, if so, what that procedure should be.

We would expect that the most likely parties who would commission an IBR of a college would be the Department for Education (following prior intervention actions), a secured creditor, or the board of the college to assist them in assessing the strategic options and the financial consequences of those options. A bank commissioning an IBR usually debits the company's or college corporation's account to cover the associated cost. If the

college was liaising with the Department for Education on an instance of financial difficulty, then the Department may, in certain circumstances, cover the cost of the IBR, as part of its assessment when considering whether or not it was appropriate to apply to court to put the college into education administration.

IBRs are usually conducted by an independent accountancy firm and would typically be undertaken by an accountant specialising in financial reviews and restructuring who may be a licensed insolvency practitioner (IP). The IP or accountant will spend time in the college, assessing the financial and strategic future of the college and addressing the matters set out in the IBR engagement contract. This will typically involve discussions with wider stakeholders, potentially, in the case of FE bodies, including Local Enterprise Partnerships, mayoral combined authorities, local authorities, the Regional Schools Commissioner, HE institutions and neighbouring colleges that could be considered for merger or other arrangements, such as receiving transferred students in the event of an insolvent college closing. The IBR takes as long as necessary, which is typically 6-10 weeks. The outcome of the IBR is not published and is primarily provided to the party commissioning the IBR in order for them to decide on the way forward.

## **What is the role of governors during an IBR?**

During an IBR, the IP or accountant appointed is not running the college and the normal management arrangements remain the same. The principal, governors and senior staff of the college are expected to co-operate with the process and support the IP or accountant in gathering necessary information to make their assessment.

## Mitigating risk for governors

As charity trustees, governors can already be held liable to their college corporation for financial loss that they cause or help to cause.

The law generally protects charity trustees and also governors who have acted honestly and reasonably and have not benefited from their actions. There is no legal protection for governors who have acted dishonestly, negligently or recklessly.

There may be financial protection for governors who have made an honest mistake and can rely on indemnity provisions in the statutory corporation's governing articles of association; insurance cover or relief from the Charity Commission or the court.

Section 145 of the [Learning and Skills Act 2000](#)<sup>18</sup> also provides that if a governor of a body corporate established under s.143(4) or (5) of the same Act is found liable of wrongdoing in civil proceedings, that individual has the right to apply to the court for relief from personal liability where they can prove that they have acted honestly and reasonably. The court is granted the power to "extinguish, reduce or vary" the liability. This clause only applies to civil proceedings, not criminal proceedings. It could be applied, for example, if a governor was found liable of making a false statement. It should be noted that the use of this clause has not been tested.

Governors may also find it helpful to refer to relevant material in any code of practice followed by the corporation.

In the very rare instance that it should be suspected or determined that a governor is responsible for misconduct, the individual(s) concerned should take personal legal advice.

Governors must not put the needs of the college's learners ahead of the college's creditors and this would not be an adequate defence to continuing to conduct the college corporation – it is only for an education administrator to put the needs of learners ahead of those of a college's creditors in the very specific circumstances of achieving the special objective of an education administration.

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<sup>18</sup> <http://www.legislation.gov.uk/ukpga/2000/21/section/145>

## What is the FE insolvency regime?

The FE insolvency regime is being introduced through the Technical and Further Education Act 2017 (TFEA 2017), the Education Administration Rules 2018 and the Further Education Bodies (Insolvency) Regulations 2019. The legislation is due to come into force on 31 January 2019. Existing insolvency law already applies to companies conducting designated institutions. The new legislation applies aspects of insolvency law to FE and sixth form colleges that are statutory corporations, and introduces a new special administration regime (called education administration) for both (i) companies conducting designated institutions and (ii) FE and sixth form colleges that are statutory corporations (together defined in TFEA 2017 as ‘further education bodies’).

## Existing insolvency procedures

The FE insolvency regime applies the following existing insolvency procedures to FE and sixth form colleges that are statutory corporations in England and Wales, as set out in s.6 of TFEA 2017:

- voluntary arrangements (including a Company Voluntary Arrangement (CVA))
- administration
- creditors’ voluntary winding up
- winding up by the court
- receivership

The conduct of these existing procedures will be governed by the provisions of the Insolvency Act 1986 (IA 1986) as modified by the Further Education Bodies (Insolvency) Regulations 2018 to apply effectively to FE college or sixth form college corporations. Therefore, they will operate broadly in the same way as they do for companies, although there are differences, recognising that college corporations do not have directors, contributories or shareholders. Provisions in existing insolvency law that require actions or decisions by company members, directors, contributories or shareholders, are either not applied or have been modified to apply appropriately to the equivalent members of an FE or sixth form college corporation.

These insolvency procedures already apply to companies that conduct education institutions designated under the Further and Higher Education Act 1992 (designated institutions) and to private companies that deliver further education.

The FE insolvency regime also introduces a new insolvency procedure called education administration, which is a special administration regime (SAR) that applies to FE and sixth form college corporations and also to companies that run designated institutions. Education administration does not apply to private providers that deliver further education, or to academies or to other school sixth forms that deliver further education.

From here on in, we will mainly describe FE and sixth form college corporations and companies that run designated institutions collectively as 'FE bodies'.

Section 39 of TFEA 2017 also modifies the Company Directors Disqualification Act 1986 (CDDA 1986) to apply to FE bodies that are statutory corporations meaning that governors can be disqualified (both as governors and as company directors) if their conduct in managing the college prior to the insolvency has been unfit. This can apply to any type of governor found responsible for wrongdoing and can also apply to other individuals including those who acted as a governor although not formally appointed as one. This could include members of the executive management team of an FE body.

## **Special administration regimes (SARs)**

Special administration regimes are based on the existing insolvency procedure of administration, but with modifications to secure continuity of an essential service if a supplier fails. There are already several of these regimes in operation to protect continuity of supply in cases of insolvency in other sectors, including social housing, postal services and energy. Each special administration regime has a special objective that is appropriate to the supplied service that is to be protected.

The special objective of education administration (set out in s.16 of TFEA 2017) is to:

- (a) avoid or minimise disruption to the studies of the existing students of the further education body as a whole, and
- (b) ensure that it becomes unnecessary for the body to remain in education administration for that purpose.

An education administration commences as a result of a court order on an application by the Secretary of State. The court may make an education administration order only if it is satisfied that the FE body is unable to pay its debts or is likely to become unable to pay its debts (i.e. is insolvent or likely to become so).

The education administrator (an IP appointed for the purpose of an education administration) may achieve the special objective through:

- rescuing the further education body as a going concern
- transferring some or all of its undertaking to another body
- keeping it going until existing students have completed their studies
- making arrangements for existing students to complete their studies at another institution

An existing student is defined in TFEA 2017 as a student who is already in attendance on a course at the college in question, or who has accepted a place on a course at the

college, when the education administration order is made. TFEA 2017 also sets out that the education administrator must, in pursuing the objective of the education administration, take into account the needs of existing students who have special educational needs.

## **What happens if a college corporation is insolvent?**

Although we expect such cases to be rare, where it is clear that a college is in severe financial distress and there is no alternative viable solution for managing the college out of that situation, the expectation is that the college will enter into insolvency proceedings.

### **Education administration**

If the outcome of an IBR indicates that a college is insolvent and the Department for Education assesses that the best way to manage that situation is through an education administration, then the Secretary of State will make an application to court for an education administration order. If the court grants the order then the college is put into education administration and an IP is appointed by the court as the education administrator (EA).

### **Who is the education administrator?**

The general functions of the EA are set out in s.24 of TFEA 2017. Primarily their function is to achieve the special objective and so to protect learner provision for existing students and then seek the best outcome for creditors as a whole. Often, the IBR will have generated a delivery plan, which the EA will aim to put in to effect if it is appropriate to the education administration in question.

The EA is a licensed IP with expertise in dealing with insolvency proceedings in a variety of sectors. They may not have direct experience of the FE sector, but will consult sector experts if they need advice. They would not be obliged to consult any one specific person, other than employee representatives if redundancies are expected. However, they are likely to liaise with the FEC and others who have already been involved in discussions with the board and senior staff at an insolvent college. Decisions concerning timings and subject of consultations will be at the discretion of the EA.

### **Other insolvency proceedings**

As set out above, education administration is not the only insolvency procedure that can apply to FE bodies. It is possible that other insolvency proceedings could be initiated by the governors or creditors and the Secretary of State could decide that an education administration was unnecessary and therefore the ordinary insolvency procedure would commence.

Also, if an education administration ultimately resulted in the closure of an insolvent FE body, then once the special objective had been achieved and learner provision had been protected, either through existing students having been transferred to another college or

having been taught out; then the education administration would be brought to a close and the FE body either dissolved or liquidated.

## What is the role of governors?

In normal administrations and in education administration, the management of the college would become the responsibility of the administrator or education administrator, and any decisions regarding staffing would be theirs to make.

The position on the role of governors and senior staff in college corporations subject to an existing normal insolvency procedures depends on the procedure. In all cases, the senior staff and governors would need to follow the direction of the office-holder. Governors have a statutory duty to co-operate with an administrator, education administrator or liquidator under s.235 of IA 1986.

A company voluntary arrangement (CVA) is a debtor-in-possession procedure – the management team retain control of the business of the college and the supervisor supervises the arrangements.

## What actions must governors take?

Actions that might be required of governors are set out in IA 1986. These include but are not limited to duties to:

- make out and submit a statement as to the affairs of the statutory corporation, setting out the particulars of the corporation's assets, debts and liabilities, details of creditors, securities held etc. (sch.B1(47) IA 1986 – education administration and normal administration)
- provide a notice of resolution to wind up – which requires the college to provide notice of the resolution to wind up the statutory corporation by advertisement in the Gazette (s.85 IA 1986 – Creditors Voluntary Liquidation (CVL))
- lay a statement of affairs before creditors (s.99 IA 1986 - CVL)
- submit a statement of affairs to the official receiver (s.131 IA 1986 – compulsory winding up)
- provide notice that the statutory corporation is in liquidation within invoices, business letters etc. and on the college's website (s.188 IA 1986 – CVL and compulsory winding-up; sch.B1(45) IA 1986 – education administration and normal administration)
- co-operate with the office-holder (meaning the IP) (s.235 IA 1986) – not applicable to a CVA or fixed charge receivership

Governors also have the power to appoint an administrator (sch.B1(22) IA 1986) but not an education administrator. There are conditions that apply to such an appointment, the main one being that the college corporation is, or is likely to become insolvent, i.e. it

must be unable to, or likely to become unable to, pay its debts. Such a decision must be evidence-based.

If the board decided to appoint their own administrator, that appointment could not be made effective until 14 days' notice of the appointment to the Secretary of State had passed, and then it could only proceed if the Secretary of State decided not to apply to court for an education administration order.

## **What are the penalties for not taking such action?**

Penalties are detailed in the specified legislation and mainly include fines, including daily default fines for continued contravention. Schedule 10 of IA 1986 lists punishments associated with offences set out in the same Act.

## **Do all duties and penalties apply to all governors?**

Governors have equal responsibility and the board must be collectively accountable for the decisions that it makes. In that respect we have treated staff governors in the same way as other governors and all duties and penalties set out in this guidance and in the Act and secondary legislation apply to both staff and other governors.

We have deliberately made allowances in the legislation for all student governors in the cases of some duties. If we had not made these allowances then these duties would have required student governors to make out and submit statements of affairs as part of insolvency proceedings. Student governors must take their responsibilities as governors and duties as charity trustees seriously, and these still apply. However, it was judged that they might be likely to have less knowledge of the college's financial affairs than other governors of the college and that it would be unfair to put them in a position where they could potentially be fined for not being able to be involved in preparing and submitting statements of affairs about the college. Some offences remain, however, in circumstances where student members give false statements, as these matters are within their own control.

- Duties and potential obligations that do not apply to student governors are:
- Duty to advertise a notice of resolution to wind up (s.85 IA 1986 - CVL)
- Duty to lay a statement of affairs before creditors setting out particulars of the college's assets, debts and liabilities, details of creditors and securities held by them etc (s.99 IA 1986 - CVL)
- Duty to submit a statement of affairs to the official receiver (s.131 IA 1986 – compulsory winding up) or administrator or education administrator (sch.B1(47,48) IA 1986)
- Duty to provide notice that the statutory corporation is in voluntary or compulsory liquidation (s.188 IA 1986) or administration or education administration

(sch.B1(45) IA 1986) on invoices, business letters etc. and on the college's website)

- Liability for material omissions from statement of affairs - (s.210 IA 1986 – CVL and compulsory winding-up)
- Company voluntary arrangement (CVA) – obligations under sch.A1(6,9,16,20,42) IA 1986. The impact of this is to remove the following obligations of a student governor:
  - to submit a statement in support of a moratorium to the nominee of the CVA;
  - to notify the nominee of the start of the moratorium;
  - to publicise the existence of the moratorium on invoices, orders, business letters and website;
  - to file with the registrar of companies an order by the court giving leave to dispose of charged property; and
  - to remove liability for the offence of making false representation to obtain a moratorium, on the basis that a student governor cannot have an obligation to make such a statement.

We have also withheld the power for governors to appoint an administrator (sch.B1(22) IA 1986) from student governors.

All governors, including staff and student governors, and anyone acting in the capacity of a governor, are covered in the legislation by the provisions on wrongful and fraudulent trading.

Staff and student governors are already in a position where they have an individual responsibility to act in the best interests of the institution as a charity and not as representatives of staff or students. They also share collective responsibility for the core objectives of the institution, including ensuring the effective use of resources and the solvency of the institution. However, the standard instrument and articles of FE and sixth form colleges make it clear that neither staff nor student governors can be Chair or Vice Chair of the corporation or can act in that capacity in their absence.

In practice, it is extremely unlikely that either staff or student governors would manage to find themselves in a position where they could direct decision-making in such a way as to cause wrongful or fraudulent trading. However, if a staff or student governor knowingly acted fraudulently or wrongfully, then they could be found liable by the court. These governors would still have a duty to challenge the decisions made, even if they could not influence them, if they should have been reasonably aware that the decision made would lead to unfit conduct or wrongful/fraudulent trading. This is because governors have a collective responsibility as charity trustees for their decision-making and cannot avoid liability by abrogating their responsibility as set out in the section on [wrongful trading](#).

## Potential liabilities and offences applicable to governors

A governor of a college that is a statutory corporation is subject to both civil and criminal law in carrying out their duties.

When an FE body has entered into formal insolvency proceedings, the official receiver (OR), liquidator, receiver or administrator must submit to the Secretary of State for Business, Energy and Industrial Strategy a report on the conduct of all directors/governors who were in office during the last three years of the FE body's trading.

The Insolvency Service, acting on behalf of the Secretary of State for Business, Energy and Industrial Strategy, receives these reports and must decide whether it is in the public interest to investigate further and, ultimately, whether to seek a disqualification order or undertaking (see section on [disqualification](#)).

Sanctions may be imposed for causing or persuading the statutory corporation to commit an offence at common law (e.g. conspiracy to defraud) or for causing or persuading the statutory corporation to commit a statutory offence.

A disqualification order may also be made by a court against a governor of a college that is a statutory corporation following conviction of a criminal offence (s.2 CDDA 1986).

## Antecedent transactions

Antecedent transactions (i.e. transactions entered into in the period running up to insolvency) can be challenged by an administrator or liquidator if the organisation was insolvent when the transaction was made or the transaction caused the organisation to become insolvent, and if certain other statutory requirements are met.

In the case of FE insolvency, the IP appointed would review the FE body's activities in the run up to the insolvency proceedings and if they identified antecedent transactions capable of challenge, they could apply to the court to reverse them, for example by 'setting aside' the transaction or recovering the asset involved. This can recover funds to increase returns and ensure a fair distribution of assets to creditors.

It is also possible to challenge the behaviour of directors/governors in the approach to insolvency in certain circumstances to seek the recovery of funds for the benefit of the estate (see sections on [wrongful trading](#) and [fraudulent trading](#)).

TFEA 2017 applies and modifies various provisions of IA 1986 to ensure that the legislation covering challenge to transactions entered into in the period prior to the insolvency proceedings and for wrongful and fraudulent trading apply.

Consequently, for both existing insolvency processes and education administrations, antecedent recoveries arise from IA 1986 as follows:

- transactions at an undervalue (s.238) - transactions of a value significantly less than the value of the consideration
- preferences (action taken out of desire to put one of the college's creditors in a better position than they would have ended up in on liquidation) (s.239)
- wrongful trading (s.214 liquidation, and s.246ZB administration and education administration) (see below for further detail on wrongful trading)
- fraudulent trading (s.213 liquidation, and s.246ZA administration and education administration) (where any business of the college has been carried out with the intent to defraud creditors)
- avoidance of floating charges (s.245)
- transactions defrauding creditors (s.423)

Colleges should note that the Government is looking to strengthen antecedent recovery powers under general insolvency law in the future, when Parliamentary time permits. For further information refer to the [Government's response to its recent consultation on Insolvency and Corporate Governance](#)<sup>19</sup>.

## Wrongful trading

The wrongful trading provisions are set out in s.214 and s.246ZB of IA 1986. It is a civil offence and occurs when directors have continued to trade, or in the case of FE insolvency, governors have allowed a college to continue to operate, when:

- They knew, or ought to have concluded that there was no reasonable prospect of avoiding entering insolvent administration, or going into insolvent liquidation; and
- They did not take "every step with a view to minimising the potential loss to the company's creditors" – or in this case the college's creditors.

Governors must act reasonably and responsibly in the time preceding insolvency to recognise the prospect of insolvency and act on it, making every effort to minimise loss to creditors. If an allegation of wrongful trading is being considered by an office-holder, culpability and personal liability may apply if the governors allowed the college to continue to operate when it had no realistic prospect of avoiding insolvent liquidation. Consideration will be given to whether the governors acted in good faith, in the honest and evidenced belief that the college would be able to recover its position and improve.

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<sup>19</sup> <https://www.gov.uk/government/consultations/insolvency-and-corporate-governance>

Wrongful trading applies in both a liquidation and an administration. In the case of FE insolvency, it applies both in the case of normal administration, education administration (the special administration regime) and liquidation. Only the administrator, education administrator or liquidator is able to apply to court.

If a successful application is made to court then the court can order a governor to make such contribution to the FE body's assets as the court thinks fit. This would also be a matter that would be relevant to a governor's conduct in relation to disqualification proceedings.

Signs of wrongful trading could include taking credit when there was 'no reasonable prospect' of being able to repay the creditor when the payment is due; failing to pay PAYE when due and building up arrears. It does not have to be limited to 'trading'.

The board is collectively accountable for the business of the college. Governors cannot avoid accountability by abrogating their responsibility. Therefore, if action is taken that leads to a wrongful trading claim; and individual governors could or should have known this was a foreseeable outcome, and did not take any reasonable steps to seek prevent that action; then all those involved, i.e. all governors, could be liable.

## **Fraudulent trading**

The fraudulent trading position is set out in s.213 of the IA 1986. It is far more serious than the civil matter of wrongful trading. In bringing a case of fraudulent trading, it is necessary to prove dishonesty and intent to deceive creditors or customers i.e. a criminal burden of proof is required to be met. There must also be proof of 'intent', so a thorough investigation would be involved.

In FE insolvency, the potential liabilities apply in normal administration, education administration and liquidation.

The consequence of a finding of fraudulent trading is that the court can declare that any person knowingly party to the fraudulent trading is liable to make such contributions as the court thinks fit to the college's assets.

## **Managing governors' duties and insolvency law requirements – do they conflict?**

This question was raised by governors during the course of consultation on the development of the legislation on the FE insolvency regime. Governors have many duties, among them duties to ensure continued provision of education and duties to remain solvent. It is up to governors to use their judgment to manage and satisfy these duties as far as they can within the restrictions imposed by insolvency (and other) legislation. Therefore, it is important that, before insolvency is actually reached,

governors must ensure that potential insolvency situations are recognised, specialist advice on governors' legal duties and the financial position of the body is taken, and responsible action results. It is only for an education administrator to put the needs of learners ahead of those of a college's creditors in the specific circumstances of achieving the special objective of an education administration.

Wrongful trading is a matter that will ultimately depend on the particular facts and circumstances of the college and any court ruling. There is a significant body of case law on the subject and this supports the need for governors to take appropriate professional advice in their particular circumstances.

The court would conduct a test of what would have been considered reasonable for a governor to have done within a specific set of circumstances and each case would be considered on its own merits.

The steps that a director/governor should take to minimise losses to creditors are not in statute. Any decision to continue operating should be reasoned and documented and, would be best made with the benefit of independent legal and professional advice. The governors should inform the ESFA immediately to collectively address the situation and, if necessary, to commence insolvency proceedings. It would be inappropriate and potentially unlawful to recognise the potential insolvency and to continue to seek new credit that they have no prospect of repaying and continue to operate ignoring a position of financial distress.

It is already incumbent on governors, as charity trustees, to have full regard to their charity law duties as set out in [guidance](#)<sup>20</sup> published by the Charity Commission for England and Wales.

## **What are the potential consequences for governors?**

The table in [Annex A](#) summarises offences with a statutory penalty that will apply to governors, and the potential consequences. The table does not include other offences, such as fraudulent trading, that do not have a statutory penalty i.e. the penalty depends on what the court may order.

Governors need to be aware of these potential liabilities. Although they may seem onerous and potentially burdensome, governors should be capable of mitigating against them through appropriate governance, financial control and planning, and taking appropriate and timely professional advice.

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<sup>20</sup> <https://www.gov.uk/topic/running-charity/trustee-role-board>

## Other offences under insolvency legislation

The liabilities within the existing insolvency provisions on wrongful and fraudulent trading are applied to governors of FE bodies that are statutory corporations through the provisions of TFEA 2017, as are the provisions of CDDA 1986. The Further Education Bodies (Insolvency) Regulations 2019 specifically modify provisions of insolvency legislation to apply them to FE bodies and governors of FE bodies. This incorporates specific duties and offences outlined within this guidance. The main (but not all) offences are set out below. For the most part, penalties for these offences include the possibility of imprisonment or a fine or both. Schedule 10 of IA 1986 lists punishments associated with offences set out in the same Act. Further detail on these offences and associated penalties are set out in the table at [Annex A](#).

### Main offences

- False representation for the purpose of obtaining a voluntary arrangement
- Fraud in anticipation of winding up
- Transactions in fraud of creditors
- Misconduct in course of winding up
- Falsification of the college's books
- Material omissions from statements relating to the college's affairs
- False representations to creditors
- Failure to notify nominee of beginning of CVA moratorium
- Failure to state in correspondence etc. that CVA moratorium is in force
- Disposal of property otherwise than in ordinary way of business during CVA
- Fraud or privity to fraud in anticipation of or during a CVA moratorium
- False representation or fraud for purpose of obtaining or extending CVA moratorium
- Failure to comply with provisions about a statement of affairs where an administrator has been appointed

### Offences that do not apply to student governors

Regulation 4 of the Further Education Bodies (Insolvency) Regulations 2019 makes modifications to insolvency legislation to apply it to colleges that are statutory corporations. Regulation 4(2) limits the extent of those modifications so that certain offences specifically do not apply to student governors. All other offences applied in the regulations apply to all governors.

The offences that do not apply to student governors are generally ones that it would be difficult for them to have any involvement in:

- Governors making material omissions from statements relating to company's affairs in a liquidation (s.210 IA 1986)
- False representation or fraud for purpose of obtaining or extending CVA moratorium (sch.A1(42)(1) IA 1986)
- Submission of information to the nominee to obtain a CVA moratorium and failure to notify nominee of beginning of CVA moratorium (sch.A1(6) and (9)(2) IA 1986)
- Failure to state in correspondence etc. that the CVA moratorium is in force (sch.A1(16)(2) IA 1986)
- Failure to provide a copy of the court order permitting disposal of charged property to the registrar of companies in a CVA (sch.A1(20)(9) IA 1986)
- In an administration - failure to state in business documents that an administrator has been appointed (sch.B1(45)(2) IA 1986)
- In an administration - failure to comply with provisions about a statement of affairs where an administrator has been appointed (sch.B1(47)(1) and (48)(4) IA 1986)

Offences that remain include the majority of offences relating to fraud and misconduct, including destroying or falsifying the college's books and unlawful disposal of property.

## Disqualification

The Company Directors Disqualification Act 1986 (CDDA 1986) provides that a variety of misconduct can result in a disqualification, the provisions of which are applied to governors of FE bodies that are statutory corporations by s.39 of TFEA 2017.

The CDDA 1986 aims to maintain the integrity of the business environment; those who become governors of college corporations should:

- Carry out their duties honestly and responsibly
- Ensure they/the college comply with the law and all relevant regulations
- Exercise adequate skill and care with proper regard to the interests of the college's creditors, customers, shareholders, employees and, in some circumstances, the general public

There is no definitive list of conduct that may lead to disqualification; however, some examples might include:

- Conduct that seeks to deprive creditors of assets
- Continuing to trade to the detriment of creditors when a company is insolvent
- Fraudulent behaviour
- Failure to keep proper accounting records
- Failure to prepare and file accounts or make returns to Companies House
- Failure to submit tax returns and/or fairly pay the tax due
- Failure to comply with other regulatory requirements
- Failure to co-operate with the official receiver and/or IP

Disqualification can last for up to 15 years, depending on the severity of the misconduct.

It is important to stress that insolvency proceedings do not automatically result in disqualification proceedings. Governors can mitigate their exposure to possible allegations of misconduct by ensuring they act reasonably, seeking independent advice and having due regard to the advice received.

Governors should seek specialist advice on their legal duties at an early stage.

Proven liability for wrongful or fraudulent trading also does not automatically result in disqualification, although the probability of disqualification is much higher as a result of liability for the very serious offence of fraudulent trading. Any disqualification will depend on the specific circumstances of the case.

Most disqualifications do not reach court and disqualification undertakings are instead given to the Secretary of State for Business, Energy and Industrial Strategy. Where there is evidence of misconduct that would warrant disqualification proceedings being commenced, a company director or governor would be given the opportunity to provide a

disqualification undertaking that they will not be a governor nor a company director for an agreed period, with the same consequences as a court order.

Disqualification orders made in England or Wales are operative in Scotland and Northern Ireland (and vice versa).

The Insolvency Service has prepared detailed [guidance](#)<sup>21</sup> on the disqualification of company directors, which includes information on disqualification orders and the process of disqualification.

## **Obtaining permission to act as a director whilst disqualified**

A person who is subject to a disqualification order or undertaking may apply to the court under s.17 CDDA 1986 for permission to act as a director or to take part in the promotion, formation or management of a named company. The court cannot give permission to a disqualified person to act as an insolvency practitioner.

The applicant will have to satisfy the court that they have a reasonable need to do what they are asking – not just that they want to be a director.

They must also satisfy the court that, if it gives the permission requested, the public will be adequately protected and therefore the court may require safeguards and may impose conditions/restrictions on the applicant.

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<sup>21</sup> <https://www.gov.uk/company-director-disqualification>

## Further reading and resources

The following is a list of sources of further information and guidance on some of the topics covered in this publication. It is not exhaustive, nor is it a substitute for professional advice relating to the specific circumstances of any particular college corporation or company. Further education bodies or individuals should always consider taking their own advice when appropriate. The Department for Education accepts no responsibility for any references or links to, or the content of, information maintained by third parties.

### **DfE - Further education corporations and sixth-form college corporations: governance guide**

<https://www.gov.uk/guidance/fe-governance>

### **ESFA - College accounts direction: Guidance for sixth form and FE colleges on preparing and submitting their annual report and financial statements 'accounts'**

<https://www.gov.uk/government/publications/college-accounts-direction>

### **Inspiring FE Governance**

<https://inspiringfegovernance.org/>

### **AoC - Training materials for governors**

<https://www.aoc.co.uk/funding-and-corporate-services/governance/governors/training-materials-governors>

### **Charity Commission - Setting up and running a charity: Trustee Role and Board**

<https://www.gov.uk/topic/running-charity/trustee-role-board>

### **Charity Commission - The essential trustee: what you need to know, what you need to do (CC3)**

<https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>

### **Charity Commission - Managing a charity's finances (CC12)**

<https://www.gov.uk/government/publications/managing-financial-difficulties-insolvency-in-charities-cc12>

### **Insolvency Service - Director disqualification**

<https://www.gov.uk/guidance/guidance-on-personal-debt-relief-options-company-liquidation-investigation-and-enforcement#director-disqualification>

### **Insolvency Service - Company investigations and enforcement**

<https://www.gov.uk/guidance/guidance-on-personal-debt-relief-options-company-liquidation-investigation-and-enforcement#company-investigations-and-enforcement>

## Annex A: offences with a statutory penalty that will apply to college governors

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
6A (1)	CVA	<p>False representation or fraud for purpose of obtaining members' or creditors' approval of proposed voluntary arrangement</p> <p>Under s.6A of IA 1986, it would be an offence if a governor made a false representation, acted fraudulently or omitted to act in order to facilitate a voluntary arrangement – even if the voluntary arrangement proposal was not approved</p>	Officer of the company	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>7 years or a fine, or both.</p> <p>-----</p> <p>6 months or the statutory maximum, or both.</p>

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
206(1)	CVL and compulsory	Fraud etc. in anticipation of winding up  It is an offence under s.206 IA 1986 to conceal or remove property, falsify entries in accounts etc. to cause detriment to creditors	A past or present officer within 12 months of the commencement of liquidation	On indictment  ----- Summary	7 years or a fine, or both.  ----- 6 months or the statutory maximum, or both.
206(2)	CVL and compulsory	Privity to fraud in anticipation of winding up; fraud, or privity to fraud, after commencement of winding up	A past or present officer within 12 months of the commencement of liquidation	On indictment  ----- Summary	7 years or a fine, or both.  ----- 6 months or the statutory maximum, or both.
206(5)	CVL and compulsory	Knowingly taking in pawn or pledge, or otherwise receiving, company property	A past or present officer within 12 months of the commencement of liquidation	On indictment  ----- Summary	7 years or a fine, or both.  ----- 6 months or the statutory maximum, or both.

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
208	CVL and compulsory	<p>Officer of company misconducting himself in course of winding up</p> <p>It is an offence under s.208 IA 1986 to fail to provide details of the nature or value of property or evidence of who has control of the property. Also to fail to deliver accounting records or falsify records of debt</p>	Officer of the company	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>7 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both.</p>
209	CVL and compulsory	<p>Officer or contributory destroying, falsifying, etc. company's books</p> <p>It is an offence under s.209 IA 1986 to destroy or falsify the statutory corporation's books, papers or securities</p>	Officer or contributory	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>7 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
210	CVL and compulsory	<p>Officer of company making material omission from statement relating to company's affairs</p> <p>It is an offence under s.210 IA 1986, when a statutory corporation is being wound up to make any material omission in a statement relating to the corporation's affairs or to otherwise conceal the true state of the corporation's affairs</p>	Officer of the company	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>7 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>
211	CVL and compulsory	<p>False representation or fraud for purpose of obtaining creditors' consent to an agreement in connection with winding up</p> <p>It is an offence under s.211 IA 1986 to make a false representation or commit a fraud in order to obtain an agreement from creditors to their detriment</p>	Officer of the company	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>7 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both.</p>

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
Sch. A1, para. 41(2)	CVA	<p>Fraud or privity to fraud in anticipation of moratorium</p> <p>It is an offence under paras. 41(2) and 41(3) of Sch. A1, IA 1986 to conduct fraudulent activity listed within paras. 41(4) and 41(7) in anticipation of or during a CVA moratorium</p>	Any officer within the period of 12 months ending with the date the moratorium came in to force	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>7 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>
Sch. A1, para. 41(3)	CVA	<p>Fraud or privity to fraud during moratorium</p> <p>It is an offence under paras. 41(2) and 41(3) of Sch. A1, IA 1986 to conduct fraudulent activity listed within paras. 41(4) and 41(7) in anticipation of or during a CVA moratorium</p>	Any officer during the period of the moratorium	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>7 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
Sch. A1, para. 41(7)	CVA	Knowingly taking in pawn or pledge, or otherwise receiving, company property	Every person who takes in pawn or pledge the property knowing it to be pawned etc.	On indictment ----- Summary	7 years or a fine, or both ----- 6 months or the statutory maximum, or both
Sch. A1, para. 42(1)	CVA	False representation or fraud for purpose of obtaining or extending moratorium  It is an offence under para. 42(1) of Sch. A1, IA 1986 to make a false representation or commit a fraud to obtain or extend a CVA moratorium	Any officer	On indictment ----- Summary	7 years or a fine, or both ----- 6 months or the statutory maximum, or both

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
207	CVL and compulsory	<p>Officer of company entering into transaction in fraud of company's creditors</p> <p>It is an offence under s.207 IA86 to make a gift of or transfer property in fraud of creditors</p>	Officer of the company	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>2 years or a fine, or both.</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>
216(4)	CVL and compulsory	Contravening restrictions on re-use of name of company in insolvent liquidation	Director or shadow director	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>2 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
Sch. A1, para. 9(2)	CVA	<p>Directors failing to notify nominee of beginning of moratorium</p> <p>It is an offence under para. 9(2) of Sch. A1, IA 1986 to fail to notify the nominee of a CVA that the moratorium has come into force</p>	Directors	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>2 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>
Sch. A1, para. 17(3)(b)	CVA	Obtaining credit for company without disclosing existence of moratorium	Any officer	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>2 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
Sch. A1, para. 18(3)(b)	CVA	<p>Authorising or permitting disposal of company property</p> <p>It is an offence under para. 18(3) of Sch. A1, IA 1986 to dispose of property in an unapproved way in a CVA (i.e. goes against conditions set out in para. 18(1))</p>	Any officer	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>2 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both</p>
Sch. A1, para. 19(3)(b)	CVA	Authorising or permitting such a payment	Any officer	<p>On indictment</p> <p>-----</p> <p>Summary</p>	<p>2 years or a fine, or both</p> <p>-----</p> <p>6 months or the statutory maximum, or both.</p>

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
Sch. A1, para. 22(2)	CVA	Authorising or permitting such a disposal	Any officer	On indictment ----- Summary	2 years or a fine, or both ----- 6 months or the statutory maximum, or both
Sch. B1, para. 27(4)	Administration	Making false statement in statutory declaration where appointment of administrator proposed by company or directors	Any person making the statutory declaration in support of an administration application under para 26 – most likely a director or directors	On indictment ----- Summary	2 years or a fine, or both ----- 6 months or the statutory maximum, or both

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
Sch. B1, para. 29(7)	Administration	Making false statement in statutory declaration where administrator appointed by company or directors	Any person making the statutory declaration in support of an administration application under para 22 – most likely a director or directors	On indictment ----- Summary	2 years or a fine, or both ----- 6 months or the statutory maximum, or both
Sch. B1, para. 32	Administration	Company or directors failing to notify administrator or others of commencement of appointment	Any person appointing an administrator under para 22. Company or directors	On indictment ----- Summary	2 years or a fine, or both. ----- 6 months or the statutory maximum, or both.
39(2)	Receivership	Company and others failing to state in correspondence that receiver appointed	Company, officer, liquidator or receiver	Summary	One-fifth of the statutory maximum.

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
85(2)	CVL	Company failing to give notice in Gazette of resolution for voluntary winding up	Liquidator, officer, company	Summary	One-fifth of the statutory maximum.
99(3)	CVL	Directors failing to attend and lay statement in prescribed form before creditors' meeting	Directors	On indictment ----- Summary	A fine ----- The statutory maximum
114(4)	CVL	Directors exercising powers in breach of s.114, where no liquidator.	Directors	Summary	The statutory maximum.

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
131(7)	Compulsory	Failing to comply with requirements as to statement of affairs, where liquidator appointed.	Any party required by the OR to complete and submit a statement of affairs – most likely the directors	On indictment ----- Summary	A fine ----- The statutory maximum
188(2)	CVL and compulsory	Default in compliance with s.188 as to notification that company being wound up.	Company, officer, liquidator, receiver or manager	Summary	One-fifth of the statutory maximum.
201(4)	CVL	Failing to deliver to registrar of court order deferring dissolution.	Liquidator or other interested person who has applied to court to defer dissolution	Summary	One-fifth of the statutory maximum.
205(7)	CVL and compulsory	Failing to deliver to registrar copy of Secretary of State's directions or court order deferring dissolution.	Whichever party applies to court to defer dissolution	Summary	One-fifth of the statutory maximum.

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
235(5)	CVL and compulsory	Failing to co-operate with office-holder.	Officers, those who have taken part in the formation of the company(if within a year of the effective date) , those in the employment of the company or who were in employment within the year	On indictment ----- Summary	A fine ----- The statutory maximum
Sch. A1, para. 16(2)	CVA	Company and officers failing to state in correspondence etc. that moratorium in force.  It is an offence under para. 16(2) of Sch. A1, IA86 to omit to include notice in invoices and business letters and on websites that the CVA moratorium is in force.	The company and any officer	Summary	One-fifth of the statutory maximum

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
Sch. A1, para. 17(3)(a)	CVA	Company obtaining credit without disclosing existence of moratorium.	The Company	On indictment ----- Summary	A fine ----- The statutory maximum
Sch. A1, para. 18(3)(a)	CVA	Company disposing of property otherwise than in ordinary way of business.	The Company	On indictment ----- Summary	A fine ----- The statutory maximum
Sch. A1, para. 19(3)(a)	CVA	Company making payments in respect of liabilities existing before beginning of moratorium.	The Company	On indictment ----- Summary	A fine ----- The statutory maximum

<b>Section of IA 1986 creating offence</b>	<b>Procedure</b>	<b>General nature of offence</b>	<b>Parties potentially liable</b>	<b>Mode of prosecution</b>	<b>Punishment</b>
Sch. A1, para. 20(9)	CVA	Directors failing to send to registrar copy of court order permitting disposal of charged property.	The Directors	Summary	One-fifth of the statutory maximum
Sch. A1, para. 22(1)	CVA	Company disposing of charged property.	The Company	On indictment ----- Summary	A fine ----- The statutory maximum
Sch. B1, para. 45(2)	Administration	Administrator, company or officer failing to state in business document that administrator appointed.	The administrator, any officer, the Company	Summary	One-fifth of the statutory maximum.

Section of IA 1986 creating offence	Procedure	General nature of offence	Parties potentially liable	Mode of prosecution	Punishment
Sch. B1, para. 48(4)	Administration	<p>Failing to comply with provisions about statement of affairs where administrator appointed.</p> <p>There is a duty on governors to provide an appointed administrator with a statement of the affairs of the statutory corporation (para. 47(1) of Sch. B1, IA86) and it is an offence under para. 48(4) of Sch. A1, IA86 not to do so.</p>	Any person required by the administrator to provide a statement of affairs – most likely a director or directors	<p>On indictment ----- Summary</p>	<p>A fine ----- The statutory maximum</p>

## **Annex B: ESFA Territorial Teams - contact details**

The ESFA further education group territorial teams combine the work of the former provider management and intervention teams, headed by a Deputy Director - Karen Sherry (North), Karen Riley (Midlands and East), David Jeffrey (London and South East), Paul Lucken (South West and South). The teams are responsible for the oversight of the FE provider base to promote high quality sustainable provision in each territory.

### **North**

Deputy Director: Karen Sherry

[karen.sherry@education.gov.uk](mailto:karen.sherry@education.gov.uk)

### **Midlands and East of England**

Deputy Director: Karen Riley

[karen.riley@education.gov.uk](mailto:karen.riley@education.gov.uk)

### **London and South East**

Deputy Director: David Jeffrey

[david.jeffrey@education.gov.uk](mailto:david.jeffrey@education.gov.uk)

### **South West and South**

Deputy Director: Paul Lucken

[paul.lucken@education.gov.uk](mailto:paul.lucken@education.gov.uk)

## Annex C: Abbreviations used in this guidance

Full Title	Abbreviation
Association of Colleges	AoC
Company Directors Disqualification Act 1986	CDDA 1986
Company Voluntary Arrangement	CVA
Creditors' Voluntary Liquidation	CVL
Department for Education	DfE
Education Administrator	EA
Education and Skills Funding Agency	ESFA
Further Education	FE
Further Education Commissioner	FEC
Further and Higher Education Act 1992	FHEA 1992
Insolvency Act 1986	IA 1986
Independent Business Review	IBR
Insolvency Practitioner	IP
Official Receiver	OR
Special administration regime	SAR
Sixth Form Colleges Association	SFCA
Technical and Further Education Act 2017	TFEA 2017



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write to Information Policy Team, The National Archives, Kew, London, TW9 4DU

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