

EXPLANATORY MEMORANDUM TO
THE EDUCATION ADMINISTRATION RULES 2018
2018 No. 1135

1. Introduction

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

2. Purpose of the instrument

- 2.1 The Technical and Further Education Act 2017 (“the 2017 Act”) introduced a new insolvency regime for further education bodies, including a new special administration regime known as education administration. This instrument sets out the detailed procedures, or rules, for the process of education administration.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England and Wales.
- 4.3 Although education is a devolved matter in relation to Wales, insolvency is not. Welsh Ministers made the decision that the insolvency regime should extend to further education bodies in Wales. An education administration order may be sought by the Secretary of State in respect of a further education body in England, or by Welsh Ministers in respect of a further education body in Wales. An application for an education administration order would be made in the courts of England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The 2017 Act makes available a special administration regime, called education administration, for further education bodies in England and Wales. The objective of an education administration is to protect learner provision for existing students at an insolvent further education body. Schedule B1 to the Insolvency Act 1986 (“the 1986 Act”) contains the legal requirements for the administration procedure in respect of

companies; this is applied, with modifications, by Schedules 3 and 4 of the 2017 Act in relation to education administration of further education bodies that are statutory corporations (Schedule 3) and further education bodies that are companies (Schedule 4).

- 6.2 Section 411 of the 1986 Act empowers the Lord Chancellor, with the concurrence of the Secretary of State and the Lord Chief Justice, to make rules for the process of education administration. The Education Administration Rules 2018 (“the Rules”) are made under section 411 of the 1986 Act as applied by section 32 of the 2017 Act.
- 6.3 The Rules mirror as far as possible the Insolvency (England and Wales) Rules 2016, and depart from them only where necessary to accommodate the special provisions of education administration and the different legal structure of statutory corporations.
- 6.4 The Rules form a package with The Further Education Bodies (Insolvency) Regulations 2018 (“the Regulations”). The Regulations apply a number of normal insolvency procedures to further education bodies that are statutory corporations. In order to commence the whole regime, both the Regulations and the Rules should come into force at the same time, to avoid any confusion should an insolvency case occur when only part of the regime applies.
- 6.5 We considered that it would be of greater assistance to both further education bodies in education administration, their creditors, and to Insolvency Practitioners to produce a separate regime that applies where a further education body is in education administration. It would have been possible to apply the Insolvency (England and Wales) Rules and then modify those, but considers that would have led to a result that is less clear for users of the legislation, particularly bearing in mind that they will be using these Rules infrequently. This would also be less clear given that those Rules are modified for an administration outside the special administration regime.
- 6.6 The special administration regime is quite different to “regular” administration; we therefore considered that stand-alone Rules reduced the risk that unknowingly a Practitioner might not be alerted to diverging from the usual Rules. It is not solely Insolvency Practitioners who will need to use the Rules; creditors and the members of the further education body will need to know the rights and obligations which the Rules give them. While practitioners are used to working with the usual Rules, creditors and members will likely not be. This approach is frequently used for special administration regimes (such as the Postal Administration Rules (S.I. 2013/3208), the Energy Administration Rules 2015 (S.I. 2015/2483) and the Housing Administration Rules (England and Wales) Rules 2018 (S.I. 2018/719)).

7. Policy background

What is being done and why?

- 7.1 In 2015, a programme of locally led Area Reviews was launched across England, with the aim of creating strong and financially resilient further education and sixth form colleges. Implementation of the recommendations of the Area Reviews, supported by funding through the Restructuring Facility (‘RF’) and the provision of Exceptional Financial Support (‘EFS’), has made great strides in supporting colleges to be more financially sustainable so that they can deliver the skills the economy needs and support social mobility. However, we recognise that some colleges may face financial difficulties in the future and we cannot rule out the possibility, however small, that a college could become insolvent. 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 EFS and RF come to an end in April 2019.

- 7.2 Alternative approaches to legislation were considered, but it was decided that a legislative approach would be most appropriate. The Government's over-riding objectives, within further education, are providing for learner protection without the need to financially support non-viable colleges, whilst also providing for orderly processes and rescue mechanisms for colleges which fail financially. We did not consider that there were any other measures that would offer equal or better protection to learners who have been placed in difficulty as a result of an institution becoming insolvent and meet these other key objectives. We therefore considered that in order to protect learners in the event of a college becoming insolvent and meet the other objectives, it was necessary to introduce an insolvency regime for FE and sixth form colleges that addresses the specific characteristics of the sector.
- 7.3 In 2016, the Government set out for consultation its proposals for the introduction of an insolvency regime for the FE and sixth form college sector. Responses to the policy consultation were received from a range of stakeholders, including individual colleges, their representative bodies, lenders to the sector and insolvency practitioners. Overall, these responses supported the development of the insolvency regime, and particularly the special administration regime, and the proposals were enacted in the 2017 Act which received Royal Assent on 27 April 2017.
- 7.4 The insolvency regime will:
- (a) ensure there is an orderly process for managing a college insolvency once funding for the current restructuring facility for the sector ends;
 - (b) reduce the reliance on government funding when colleges fail (currently provided through EFS); and
 - (c) through the special administration regime, allow for student provision to be protected in the unlikely event that a college becomes insolvent.
- 7.5 The 2017 Act contains powers that allow for the application and modification of existing insolvency legislation in order to effectively apply it to further education bodies. The Regulations make modifications to insolvency legislation (and insolvency-related legislation) to enable that legislation to operate effectively for FE bodies that are statutory corporations (further education corporations and sixth form college corporations). The instrument also applies and modifies provisions of the Companies Act 2006 in relation to documents to be filed with the registrar of companies for statutory corporations. Some modifications are also made to various other legislation to reflect education administration, which will apply to statutory corporations as well as companies which run designated further education institutions.
- 7.6 The 2017 Act also introduced a new insolvency procedure, known as education administration. Education administration is a special administration regime ('SAR'). SARs are based on the normal insolvency process of administration, but with modifications to secure the continuity of an essential public service if a supplier fails.
- 7.7 The main features of an education administration have already been set out in the 2017 Act. Education administration largely replicates the process of normal company administration, but includes a special objective (at section 16 of the 2017 Act), which 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.

There is still a requirement to achieve the best result for the further education body's creditors as a whole, but only so far as is consistent with the objective of the education administration.

- 7.8 An existing student is defined in the 2017 Act as a student who is already in attendance on a course at the relevant institution, or who has accepted a place on a course at the relevant institution, when the education administration order is made.
- 7.9 The powers in the 2017 Act enable the “appropriate national authority” (defined in the 2017 Act as the Secretary of State in respect of a further education body in England or Welsh Ministers in respect of a further education body in Wales) to apply to the court for an education administration order where the further education body is unable to pay its debts or likely to become unable to pay its debts. The court can then appoint an education administrator. The education administrator would manage the affairs, business and property of the further education body for the duration of the education administration.
- 7.10 The education administrator is required to develop proposals in order to achieve the objective of the education administration. The 2017 Act sets out the means by which the education administrator may achieve that objective, which include:
- (a) rescuing the further education body as a going concern,
 - (b) transferring some or all of its undertaking to another body,
 - (c) keeping it going until existing students have completed their studies, or
 - (d) making arrangements for existing students to complete their studies at another institution.
- In pursuing the objective of the education administration, the education administrator must, in particular, take into account the needs of existing students who have special educational needs.
- 7.11 The Rules are the procedural framework for an education administration. They prescribe matters required by the 2017 Act and the 1986 Act, and set out the technical procedures and processes to be followed in the conduct of education administration proceedings, such as applications to court, the process of education administration, court proceedings rules and claims by and distributions to creditors.

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

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

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

10. Consultation outcome

- 10.1 The Department for Education published a technical consultation on the insolvency regime, which ran from 18 December 2017 to 12 February 2018.

- 10.2 The consultation received 30 formal responses. The Government response to the consultation is available at <https://www.gov.uk/government/consultations/insolvency-regime-for-further-education-and-sixth-form-colleges>. Three questions in the consultation related specifically to education administration. One question asked about who should be notified of an education administration application and an education administrator's appointment, and who should receive copies of the education administrator's proposals. The second question asked about the content of the education administrator's proposals. The third question asked for any other comments about the process of education administration. Respondents' views and comments to these questions have been considered and, where appropriate, we have made provision in the Rules to reflect the comments made.
- 10.3 We received a number of comments about the provisions relating to transfer schemes in an education administration, and particularly around the transfer of secured assets. Transfer schemes are a standard measure in special administration regimes. They allow for the transfer of property, rights and liabilities for the purposes of achieving the special objective without requiring third party consent. Provisions on transfer schemes for an education administration are set out in the 2017 Act. These allow the education administrator to transfer property, rights and liabilities (if required to achieve the objective of an education administration) without the consent of any person other than the transferee and the appropriate national authority. However, the education administrator is required to obtain the approval of the court in order to remove the security attached to an asset before transferring it. Furthermore, the asset transfer proposal would need to be first approved by the appropriate national authority. We have given a commitment that the Secretary of State or the Welsh Ministers would therefore not approve a proposed transfer scheme that did not take account of the rights of secured creditors.
- 10.4 We have also shared drafts of the instrument with key stakeholders.

11. Guidance

- 11.1 Guidance is not required in order to interpret this instrument. If used, the Rules would be followed by licensed insolvency practitioners, who are already well versed in insolvency proceedings, including special administration regimes.
- 11.2 The Department will publish two sets of general guidance before this instrument comes into force. Neither set of guidance is a statutory requirement and will not need to be ready for laying, as much of the information that will be contained within the guidance has already been set out previously in public consultations. The information is intended more as a guide for those within the FE sector, particularly college governors, who may not be familiar with the concepts and processes of insolvency, particularly relating to a special administration regime.
- 11.3 The first set of guidance will provide information to governors on their duties and liabilities under insolvency law and will form part of wider updated guidance to governors on good governance and financial management.
- 11.4 The second set of guidance will provide a high-level overview of applicable ordinary insolvency processes as well as key modifications that we have made to ordinary insolvency to make it work for the FE sector. It will also provide a high-level overview of the special administration regime.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is expected to be minimal. The central estimate of the impact is £39,184 for all FE colleges (283). This is mainly for familiarisation costs of the legislation. The central indicative estimate for familiarisation costs of the legislation 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. Additionally, all colleges (283) will need to gain a high level of understanding of the insolvency regime.
- 12.2 The impact on the public sector is expected to be positive as an insolvency regime will provide better value for money than the current approach, and the special administration regime specifically provides for the protection of provision to existing students at an insolvent college.
- 12.3 An Impact Assessment has not been prepared for this instrument because of the minimal impact on businesses, charities or voluntary bodies. The Department has conducted an assessment of the impact of the insolvency regime, which is available from the Department for Education, Higher and Further Education Directorate, Sanctuary Buildings, Great Smith Street, London SW1P 3BT.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses. It should be noted that only a small proportion of FE colleges would be classed as small businesses, i.e. with a workforce of less than 50.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The legislation is not considered to have a disproportionate impact on small businesses. The Government considers that the Rules impose negligible costs to small businesses because they will be used so infrequently. This legislation will only take effect in the rare event of an insolvency, rather than being an ongoing obligation on colleges. Under ordinary and well-established company insolvency, there is no distinction drawn in the treatment of small businesses and other businesses in the event of an insolvency. We have therefore mirrored this approach.

14. Monitoring & review

- 14.1 A statutory review clause is included in the instrument. The Government is required to review the Rules within 5 years after they come into force.

15. Contact

- 15.1 Ian Smith at the Department for Education, telephone: 0739 101 8261 or email: ian.smith@education.gov.uk, can answer any queries regarding the instrument.
- 15.2 Jeremy Benson, Deputy Director for FE Financial Resilience and Sustainability at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Right Honourable Anne Milton MP, Minister of State for Apprenticeships and Skills at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.