



DISSOLUTION OF A CORPORATION - PROPERTY, RIGHTS AND LIABILITIES

Purpose of this information sheet

This material is for information only and is not intended to be exhaustive, nor should it be treated as a substitute for legal advice. The transfer of property, rights and liabilities upon the dissolution of a FE corporation is complicated and each dissolution will be different. Where a FE corporation is proposing to dissolve itself, it should seek its own legal advice.

The new provisions of the Further and Higher Education Act 1992 (as amended by the Education Act 2011 and Statutory Instruments 2012/1157 and 2012/1167)

1. As of 1 April 2012, the power to dissolve a FE corporation sits solely with the FE Corporation itself, together with the power to transfer property (including assets), rights and liabilities to a consenting recipient upon dissolution (which must be a body prescribed in the Regulations). The power to establish a new FE Corporation remains with the Secretary of State. The Secretary of State also has the power, *in extremis*, to direct a college to dissolve itself where one or more of the prescribed triggers for intervention under section 56A apply (Annex 1), for example where there has been mismanagement of the institution's affairs or where there is failure in the standards of education or training.
2. Where a FE corporation intends to use its power to dissolve, it is required to publish and consult on proposals for dissolution in accordance with *the Further Education Corporations (Publication of Proposals) (England) Regulations 2012* (S.I. 2012/1157), which set out the process for publishing and consulting on proposals for dissolving a FE corporation (<http://www.legislation.gov.uk/uksi/2012/1157/contents/made>). The regulations include a requirement that the FE Corporation publish the proposed arrangements for the transfer of the property, rights and liabilities of the FE Corporation, at which point the Secretary of State and Chief Executive of Skills Funding (CESF) would be able to raise any concerns they had about the proposed arrangements. The full process is set out in Annex 2.
3. *The Dissolution of Further Education Corporations and Sixth Form College Corporations (Prescribed Bodies) Regulations 2012* (S.I.

2012/1167) lists the bodies to which a FE corporation can transfer its property, rights and liabilities upon its dissolution (<http://www.legislation.gov.uk/ukxi/2012/1167/contents/made>). Section 27B provides that where the transferee is not a charity established for charitable purposes which are exclusively educational purposes, then any property transferred must be transferred on trust to be used for charitable purposes which are exclusively educational purposes.

4. If despite all reasonable efforts, the FE Corporation cannot identify a recognised body to which the property, rights and liabilities can be transferred, then the FE Corporation would need to consider all other available options. The expectation is that in exploring those options the FE Corporation would involve the Secretaries of State for Business, Innovation and Skills and for Education, the Chief Executive of Skills Funding, the Chief Executive of the Education Funding Agency and, where appropriate, the Local Authority.

Duties and responsibilities of Corporation members as Charitable Trustees¹

5. In addition to their responsibilities as set out in Education Legislation, FE Corporations, as exempt charities, are subject to the legislation governing charities. The trustees of a FE Corporation have the same general duties and responsibilities as trustees of other charities. These include ensuring that the charity is well-run, delivering the charitable outcomes for the benefit of the public for which it has been set up and avoiding activities that might place the charity's endowment (if any), funds, assets or reputation at undue risk.
6. With respect to the financial management of the FE Corporation, members as trustees are expected to take steps to ensure the continued viability of the charity and its activities. Trustees have and must accept ultimate responsibility for directing the affairs (including the solvency) of the charity. Should a FE Corporation become insolvent (i.e. its assets are not sufficient to cover its liabilities) it is the responsibility of the individual Corporation to secure its own legal advice.
7. Before a proposed dissolution can proceed, it is the responsibility of the FE Corporation to ensure orderly arrangements for the disposal of its property, rights and liabilities, maximizing the funds available to settle liabilities.
8. FE Corporations are advised to consider in full the guidance on the Charity Commission's website.
 - The Essential Trustee (an overview of trustees' duties) <http://www.charitycommission.gov.uk/Library/guidance/cc3text.pdf>
 - The solvency of the charity, including the insolvency processes <http://www.charity-commission.gov.uk/library/guidance/cc12text.pdf>.

¹ These duties and responsibilities are unchanged by the Education Act 2011

- Guidance on closing a charity (the references to informing the Commission and removal from the Register do not apply to exempt charities):
http://www.charitycommission.gov.uk/FAQS/Closing_a_charity/default.aspx

Interest in Assets

9. The Secretary of State and the CESF are concerned with the appropriate use of those capital assets that have been acquired/developed/redeveloped with public funding and the conditions for their transfer and usage as set out in paragraphs 1-4 above. FE corporations are advised to undertake early discussions with the Skills Funding Agency to identify the relevant assets and any potential repayment of some, or all of the associated grant or proceeds of sale. It is recognised that not all FE Corporation assets will have been derived from public funding and these fall outside the interest of the Secretary of State and the CESF.
10. The legislation only allows FE Corporations to transfer THEIR property, rights and liabilities. Anything owned by others (e.g. Trusts) is the responsibility of those who own it and FE Corporations should agree with the owners what will happen to such property upon its dissolution.

Asset Transfer

11. The value that a FE Corporation places on its assets in its statutory accounts is a matter for agreement between the FE Corporation and its external auditors. Prior to transfer, it is expected that the assets would be independently valued and should transfer in accordance with Charity Commission rules. Any “rights” associated with the asset (e.g. those currently included in the Capital Grant paperwork) would also transfer.
12. The Chief Executive of Skills Funding (CESF) will expect the Accounting Officer appointed by the FE Corporation to ensure that there is compliance with the Financial Memorandum (paragraph 8) and all other terms and conditions of funding. The CESF through the Financial Memorandum (paragraph 27) reserves the right to impose additional conditions of funding where she/he considers it necessary.
13. It is the responsibility of the FE Corporation to ensure that there is an appropriate split of assets if required to enable, as far as is possible, continuing provision for pre and post-19 age groups. Where the requirement for this split is due to a proposal for dissolution the Skills Funding Agency will make its expectations clear in its response to the statutory consultation.

Asset Sale

14. As for asset transfer, the expectation is that the FE Corporation would have the asset independently valued and look to realise as near that

price as possible in the market conditions operating at the time of the sale.

15. Where the asset has been acquired/developed/redeveloped with grant funding, at the point that the proceeds of the sale are available for disposal, the CESF, through the Financial Memorandum (paragraph 15) will reserve the right to require payment of some or all of the associated grant or proceeds of sale. Where these reserved rights apply, the CESF will require the transfer to be made with the relevant legal charge attached. These cases will be dealt with on a case by case basis. The remaining proceeds would then belong to the FE Corporation and it would be for the FE Corporation to dispose of in accordance with regulations and its charitable objects.
16. If the FE Corporation chooses to sell the asset for less than market value as part of a dissolution process, then some form of security may be required to be put in place by the corporation, to ensure that publicly funded assets transferring to a non-prescribed successor body continue to be protected. It is intended that this approach will be used sparingly and would be lifted once the assets transferred have been depreciated. These would be dealt with by the CESF on a case by case basis.

Intangible Assets

17. It is the responsibility of the FE Corporation to take the necessary action to value any intangible assets (e.g. copyright, domain names and trade marks.)

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FE Corporations in England: Intervention Powers of the Secretary of State

(Section 56A of the Further and Higher Education Act 1992 as amended by the Education Act 2011)

- (1) This section applies if the Secretary of State is satisfied as to one or more of the matters listed in subsection (2) in the case of an institution in England within the further education sector other than a sixth form college; and it is immaterial whether or not a complaint is made by any person.
- (2) The matters are--
 - (a) that the institution's affairs have been or are being mismanaged by the institution's governing body;
 - (b) that the institution's governing body have failed to discharge any duty imposed on them by or for the purposes of any Act;
 - (c) that the institution's governing body have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under any Act;
 - (d) that the institution is performing significantly less well than it might in all the circumstances reasonably be expected to perform, or is failing or likely to fail to give an acceptable standard of education or training.
- (3) If this section applies Secretary of State may do one or more of the things listed in subsection (6).
- (5) At the same time as doing one or more of those things the Secretary of State must give the institution's governing body a notice stating--
 - (a) the matter or matters listed in subsection (2) as to which the Secretary of State is satisfied;
 - (b) the reasons why the Secretary of State is so satisfied;
 - (c) the reasons why the Secretary of State has decided to do that thing or those things.
- (6) The Secretary of State may--
 - (a) remove all or any of the members of the institution's governing body;
 - (b) appoint new members of that body if there are vacancies (however arising);
 - (c) give to that body such directions as the Secretary of State thinks expedient as to the exercise of their powers and performance of their duties.
- (7) The directions that may be given to a governing body under this section include –
 - (a) direction requiring a governing body to make collaboration arrangements (within the meaning of section 166 of the Education

and Inspections Act 2006) with such bodies and on such terms as may be specified in the direction.

- (b) a direction requiring a governing body to make a resolution under section 27A(1) for the body to be dissolved on a date specified in the direction.

(7A) A governing body to which a direction such as is mentioned in subsection (7) (b) is given is to be taken for the purposes of section 27A(1) to have complied with section 27 before making the resolution required by the direction.

(8) Directions may be given to a governing body under this section despite any enactment making the exercise of a power or performance of a duty contingent on the body's opinion.

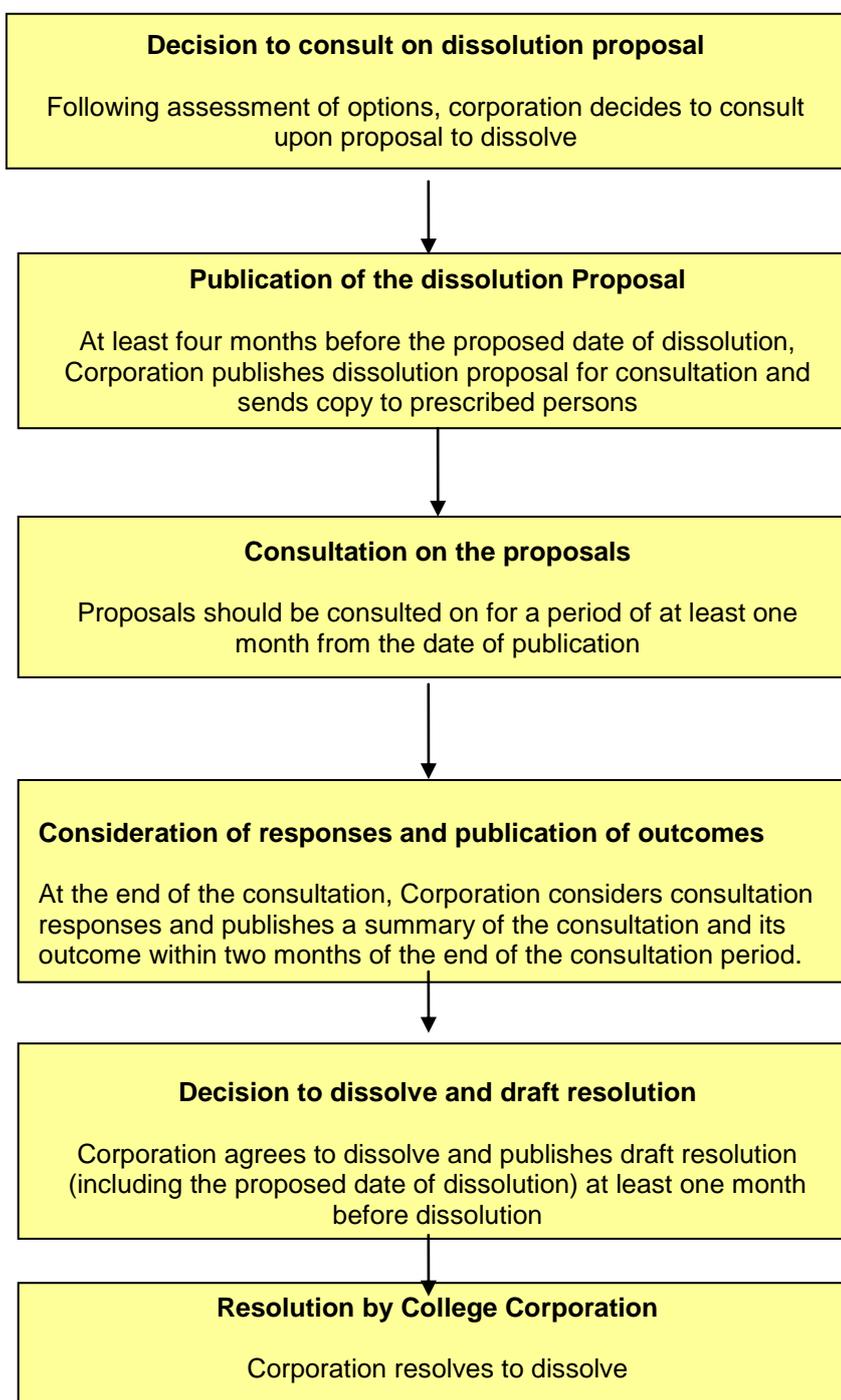
(9) The Secretary of State may not give a direction to a governing body under subsection (6)(c) which relates to the dismissal of a member of staff.

(11) A governing body must comply with any directions given to them under this section.

(12) An appointment of a member of a governing body under this section shall have effect as if made in accordance with the instrument of government and articles of government of the institution concerned.

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Dissolution Process for further education corporations



Note: where a dissolution proposal involves establishing a new corporation, which is the responsibility of the Secretary of State (SoS), the corporation(s) must submit the draft proposal to the SoS for comment *before* going out to consultation and must submit any final proposal for SoS agreement to establish the new corporation *before* publishing the outcomes of the consultation.