

PRIVATE & CONFIDENTIAL

Ben Dance
Department for Business, Innovation and Skills
Vocational Education Directorate
Orchard 1
1 Victoria Street
London
SW1H 0ET

5th August 2016

Dear Mr Dance,

Developing an Insolvency Regime for the Further Education & Sixth Form Sector

Please find attached Barclays response to the Department's inquiry into insolvency regimes for the Further Education (FE) and Sixth Form College Sector.

We welcome the opportunity to respond to this consultation and are pleased to see the Department examining this crucial issue.

We are supportive of the objective of the proposals to protect learners and welcome any clarity on what happens in the event of insolvency in the sector. However, we believe that consideration should be given to who funds an insolvent college once the regime has been initiated and the impact the regime is likely to have on the credit quality of the sector and the availability of bank finance.

It is important to note that the ability of the sector to raise funding at appropriate rates relies strongly on lenders having certainty over their legal and credit position.

We trust that you find Barclays contribution of assistance. If you would like more information or would like to discuss our response in more detail, please email me at richard.robinson9@barclays.com.

Yours sincerely,



Richard Robinson
Regional Director - Public Sector Team and Head of Education

Developing an Insolvency Regime for the Further Education and Sixth Form Sector consultation – response from Barclays PLC

Introduction

Barclays are a significant supporter and stakeholder of the further education sector. In England, we have banking relationships with over 150 colleges, lending to over 120 of them.

As with any sector with ongoing borrowing requirements, legal certainty is essential to ensuring continued ability to raise funding at the right price. As such, clarity on what happens in the event of insolvency in the sector is welcome.

Whilst it is entirely appropriate the Special Administration Regime's (SAR) primary focus is the interest of learners, we do take comfort that the interests of other stakeholders (including employees at the college, local employers, the taxpayer and creditors) are also being taken into consideration.

As noted in our responses to the questions, we also believe it is important that the educational administrator has a duty of care to all creditors and that he carries out his functions in a way that achieves the best result for a college's creditors as a whole.

We are also concerned that the long term needs of the further education sector will not be met if we do not achieve an appropriate balance between all stakeholders.

In that context, Barclays make the following central observations:

- **Clarity and certainty** - For the SAR to work there will need to be clarity as to who funds an insolvent college once the regime is initiated.
- **Impact** - It should also be noted that the proposed insolvency regime is likely to have an adverse impact on the credit quality of the sector and will impact the availability of bank finance and the commercial terms upon which that finance is made available.
- **Security** - In particular, appropriately valued security - most likely mortgages over college campuses - will become commonplace. This will likely impact the availability of financing, depending upon where a college campus is located (and therefore the value of real estate).

Question 1: Do you agree that only the SAR element of this regime should be applied only to Designated Institutions that are companies? Please give reasons for your answer.

We note the comments made in paragraph 34 of the consultation paper regarding the high degree of specialism within the three DIs that are not companies and the difficulty in transferring learners to suitable alternative providers as a result. Consequently, it seems unlikely that the purpose of a SAR (as proposed) could be readily met and would, therefore, tend to agree that these institutions should not be included.

Question 2: Do you think any of the insolvency measures summarised in our proposals (Company Voluntary Arrangement, ordinary administration, compulsory liquidation and creditors' voluntary liquidation) should be available in the event of college insolvency as well as a Special Administration Regime? Please explain your answers.

We welcome the proposal to establish a comprehensive insolvency regime for the sector with a clear remit to provide flexibility whereby colleges can be rescued and clarity of process where they cannot. The SAR appears to achieve this objective (subject to our answers to later questions) and we would anticipate that it would be appropriate in the majority of instances.

We can see the benefit of having the CVA and liquidation processes available as an exit mechanism from a SAR. However, we question the benefits of making the liquidation processes available on a standalone basis as we do not readily see how they would enable the appointed practitioner to best protect the learners and/or consider a rescue strategy. We may also see colleges targeting higher surpluses and increasing cash reserves to guard against creditor action, which may not be to the ultimate benefit of the sector or the learners.

Question 3: Does the proposed special objective sufficiently reflect the needs of learners and creditors? Please explain your answer.

We look forward to reading with interest the views of others being consulted on whether the proposed special objective sufficiently reflects the needs of learners.

As noted above, we welcome the proposal to establish a comprehensive insolvency regime for the sector and we recognise the importance of protecting the learners. However, it is also important that the SAR acknowledges the position of all creditors of a college.

To that end, in addition to the Special Objective detailed in paragraph 69 of the consultation paper, we would expect the purposes of a SAR to be those set out in Schedule B1 of the IA '86 - we consider that this would properly reflect the stated intention in paragraph 71 of the consultation paper.

Additionally, the proposal raises wider concerns. For example, the funding of an insolvent college once the regime has come into effect will be important for creditors, as it is unlikely that creditors will look favourably on any approach that diminishes their return, particularly if they are a secured lender.

It is important to restate that the ability of borrowers to raise money, and to do so at a reasonable cost, is dependent on the lender having certainty over their legal position in the event that the borrower falls into difficulty.

Lenders to this sector should not be treated any differently than lenders to other sectors in an insolvency scenario. If this is not the case we would foresee a reluctance to lend to the sector in the first place.

More specifically we would be interested to know:

- Who would the education administrator be?
 - we would expect the education administrator to be a qualified insolvency practitioner with experience of the sector.
- How is the insolvent college funded, and by whom, during the SAR?
 - if the priority under the SAR is the learners then the insolvent college will need to trade as a going concern to finish the term(s) or academic year(s)
 - this will require working capital from a source external to the insolvent college
 - it is currently proposed that the Secretary of State (SoS) be able to make loans, issue indemnities or make guarantees for this purpose however, this requires further clarity.

Question 4: Do you have any comments on our proposals for SAR initiation?

We have no specific comments on this point but look forward to reading with interest the views of others being consulted.

Question 5: What issues, if any, would you envisage in the event transfer of provision or assets/liabilities were required?

With regard to comments made in paragraph 77 of the consultation paper, we consider that the proposals should be approved by the creditors in the usual way under the existing administration legislation. This is consistent with the objective of the administrator carrying out his functions in a way that achieves the best result for a college's creditors as a whole. This also seems reasonable as it is likely that creditors will be required to support any rescue strategy that involves ongoing 'trading' post appointment.

With regard to comments made in paragraph 78 of the consultation paper, we consider that a SAR should be subject to the same 'automatic end' provisions as set out in paragraph 76 of Schedule B1 to the IA '86. Given the moratorium that will be in place during the SAR we consider that it is in the best interests of creditors as a whole if these provisions are included for SARs.

In instances where a lender (or other party) has taken a specific fixed charge over freehold/leasehold land (or other tangible assets) we would expect the SAR to obtain consent before executing any transfer. This mirrors conventional practice with regards to security and enforcement, whereby a secured lender would have to release security at the point of sale but always subject to the provisions contained within paragraph 71 of Schedule B1 to the IA '86.

Our standard documents do not permit loan agreements to be transferred, in order to protect the Bank's position. Furthermore, Banks will want to ensure they are not left lending to an empty shell or have loans novated to a provider they are not comfortable with (or on terms that are commercially unacceptable). However, as a bank we would always be open to assessing a lending proposition from a newly formed entity.

Question 6: Do you have any views on our proposals in relation to directors' and governors' liabilities?

We have no specific comments in response to this specific question but look forward to reading with interest the views of others being consulted.

However, we do note the comments made in paragraph 83 and would be interested to understand whether it is envisaged that grants and loans provided by the SoS would rank as expenses of the SAR or be afforded any elevated priority status. Again, we would observe that the education administrator should carry out his functions having regard to the interests of all creditors. Any suggestion of an elevated priority status will clearly have an adverse impact on future lending to this sector.

Question 7: Do you agree that, as a matter of general principle, the insolvency law applying to companies on the avoidance of transactions should apply to colleges? Please explain your answer.

As a likely creditor in any insolvency proceedings we do agree with this general principle.

Question 8: Do you agree that only provisions of Part 3 of the Insolvency Act 1986 that deal with fixed charges should apply to colleges? Please explain your answer.

The powers of a receiver would not be sufficient to fulfil the needs of operating a college. The SAR should adopt the same powers granted to an administrator appointed under a conventional floating charge and outlined in Schedule B1 to the IA '86. Notwithstanding this, our security documents permit us to appoint a receiver over charged property.

Question 9: Do you have any other comments on the proposals set out in the consultation document? Do you have any other comments that might aid the consultation process as a whole?

The rationale for having an insolvency regime appears sound and the clarity is welcome.

Historically lending to this sector has been primarily on an unsecured basis. However, with the introduction of a formal insolvency regime, lenders will require security to adequately protect their positions.

Where fixed asset security is not available to meet asset cover requirements debt funding is not likely to be extended (or existing funding may be withdrawn) even if that debt is serviceable. This is likely to be more of an issue for colleges located in areas of lower property values.