EXPLANATORY MEMORANDUM TO

THE EDUCATION (EXEMPTION FROM SCHOOL AND FURTHER EDUCATION INSTITUTIONS INSPECTIONS) (ENGLAND) (AMENDMENT) REGULATIONS 2020

2020 No. XXXX

1. Introduction

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

2. Purpose of the instrument

2.1 Currently, some schools[1] and colleges[2] judged 'outstanding' by Ofsted are exempt from regular Ofsted inspections. These regulations remove that exemption, and set the period within which 'outstanding' schools must now be inspected. The inspection period for colleges is not specified in regulations[3]. The changes will mean that these schools and colleges will benefit from Ofsted's independent inspections and up-to-date information on their performance, and where they might need to make improvements. The changes will also increase the information available to parents and the wider public, and will enhance confidence in the inspection system and the judgements made.

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 The entire instrument applies to England only because it applies only to schools in England (see regulation 1(2) of the instrument).

3.3 The instrument does not have any minor or consequential effects outside England.

3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the Welsh Parliament if equivalent provision in relation to Wales were included in an Act of the Welsh Parliament.

3.5 The Department has reached this view because it considers that the purpose of the instrument relates to education, which is within the devolved legislative competence of each of the three devolved legislatures. The instrument does not relate to a reserved

[1] State-funded schools other than nursery schools, special schools, pupil referral units and alternative provision academies.

[2] Institutions within the statutory FE sector and 16 to 19 academies.

[3] Intervals for college inspections are set by Ofsted as a matter of policy.

matter in Schedule 5 to the Scotland Act 1998 or Schedule 7A to the Government of Wales Act 2006 and is not an excepted or reserved matter in Schedule 2 or 3 to the Northern Ireland Act 1998. The instrument is not otherwise outside the legislative competence of the Scottish Parliament[4], Northern Ireland Assembly[5] or the Welsh Parliament[6].

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 set out in Section 3 under "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).

5. European Convention on Human Rights

5.1 The Minister of State for Education, Nick Gibb has made the following statement regarding Human Rights:

"In my view the provisions of The Education (Exemption from School and Further Education Institutions Inspections) (England) (Amendment) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

Schools

6.1 Section 5 of the Education Act 2005 (the "2005 Act") requires the Chief Inspector to inspect state-funded schools in England at prescribed intervals. The Regulations[7] prescribe a five year period[8] in which these inspections must take place.

6.2 Section 5(4A) of the 2005 Act[9] provides that regulations may disapply section 5 inspections for certain categories of school in certain circumstances. The Regulations[10] exempt from section 5 inspections state-funded 'mainstream' schools'[11] judged 'outstanding' at their latest section 5 inspection. They also exempt academy schools that have not had a section 5 inspection where the school's predecessor[12] was judged 'outstanding' in its last section 5 inspection.

6.3 Exempt schools can still be inspected by the Chief Inspector under section 8 of the 2005 Act, for example if there are concerns about the school or in order to conduct a survey. Under section 9, the Chief Inspector may convert a section 8 inspection into a section 5 inspection.

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4 See section 29 of the Scotland Act 1998.

5 See section 6 of the Northern Ireland Act 1998.

6 See section 108A of the Government of Wales Act 2006.

7 The Education (School Inspection) (England) Regulations 2005 (S.I. 2005/2038).

8 A period not exceeding 5 years after the end of the school year in which an earlier section 5 inspection or a "relevant section 8" inspection has taken place.

9 Inserted by section 40 of the Education Act 2011.

10 The Education (Exemption from School Inspection) (England) Regulations 2012 (S.I. 2012/1293) (School Exemption Regulations)

11 State-funded schools other than nursery schools, special schools, pupil referral units and alternative provision academies.

12 A school which converted into an academy under section 4 of the Academies Act 2010 or a school which was discontinued and which the academy replaced.

Institutions within the statutory FE sector and 16 to 19 academies

6.4 Section 125 of the Education & Inspections Act 2006 (the "2006 Act") requires the Chief Inspector to inspect colleges. The intervals at which college inspections take place may be specified by the Secretary of State. Such intervals have not been specified and are set by Ofsted as a matter of policy[13].

6.5 Section 125(1A)[14] enables regulations, to disapply the requirement for section 125 inspections for certain categories of college in certain circumstances. The Regulations[15] exempt certain colleges judged 'outstanding' at their latest inspection from section 125 inspections.

6.6 Exempt colleges can still be inspected by the Chief Inspector under section 126 of the 2006.

This Instrument

6.7 This instrument revokes the School Exemption Regulations and FE Exemption Regulations. When revoked, schools and colleges that are currently exempt from routine inspection will no longer be exempt.

6.8 This instrument also makes clear that the Chief Inspector must inspect all former exempt schools under either section 5 or section 8 of the 2005 Act, before 1 August 2026.

6.9 If that first inspection of the former exempt school, is a section 5 inspection, the school's subsequent inspections must then take place within the five year windows that apply to other schools. The same applies where the first inspection is a section 8 inspection and the Chief Inspector is satisfied that the school has maintained its 'outstanding' performance.

6.10 Where the first inspection is a section 8 inspection and the Chief Inspector is not satisfied that the school has maintained its 'outstanding' performance, the school must receive a section 5 inspection before 1 August 2027. Subsequent inspections will then revert to the five year cycle.

7. Policy background

What is being done and why?

7.1 Most schools and colleges are inspected by Ofsted at regular intervals (within a 5 year window). This is not the case for some schools and colleges that have been judged 'outstanding' by Ofsted, the highest grade awarded by Ofsted. They are exempt from routine inspection. The exemption, which has been in place since 2012, applies to around 3,600 schools and 60 colleges.

7.2 Although Ofsted cannot routinely inspect exempt schools and colleges, it can, and does inspect them in particular circumstances, for example, where a complaint or Ofsted's risk assessment process identifies concerns. Last year 10% were visited.

7.3 Despite this, the exemption means that some schools and colleges have not been inspected by Ofsted since 2006/7. Around 1,000 exempt schools and 22 exempt

[13] As such, no transitional arrangements are included in these regulations for those colleges which are currently covered by the exemption.

[14] Inserted by section 42 of the Education Act 2011.

[15] The Further Education Institutions (Exemption from Inspection) (England) Regulations 2012 (S.I. 2012/2576) (FE Exemption Regulations).

colleges have not been inspected for a decade or longer. Many exempt schools and colleges were judged 'outstanding' under previous Ofsted inspection frameworks, which placed different expectations on them.

7.4 The exemption was introduced to recognise and reward high performing schools and colleges, allowing them to continue to focus on providing excellence with less intervention, and concentrating inspection where it was needed most. That principle remains important, but it is right to periodically review whether the balance between this and the need to provide appropriate assurance through Ofsted's independent assessments, is optimal.

7.5 In September 2019, Ofsted introduced a new Education Inspection Framework, with a stronger focus on having a broad, balanced and ambitious curriculum for all pupils and students. The Framework evaluates schools' and colleges' strength against what research and evidence says are the most important factors in pupils' and students' education.

7.6 The Government believes that the exemption is starting to lead to a loss of confidence in the 'outstanding' grade. Schools, colleges, parents and students are missing out on having an up to date independent assessment of quality and performance and, importantly, are not benefiting from inspections undertaken under Ofsted's new research-based inspection framework. This can only be addressed by lifting the exemption, and the Government believes the time is right to make that change.

7.7 In September 2019, the Government announced its intention to lift the exemption so that all outstanding schools and colleges are again inspected in a regular inspection window by Ofsted, subject to consultation and parliamentary approval of the relevant regulations.

7.8 A consultation took place between 10 January and 24 February 2020. It identified strong support for the Government's proposals. Details of the consultation outcome are set out in section 10.

7.9 On 17 March 2020, the Secretary of State announced the temporary suspension of routine Ofsted inspections to alleviate pressure on school and college leaders and staff and enable them to focus entirely on responding to coronavirus (COVID-19). The suspension remains in place, but the intention is that routine inspections will resume from January 2021, with that date being kept under review.

7.10 In this context, the Department delayed publication of the Government response to the consultation and moved back the originally proposed September 2020 implementation date. The intention is now that Ofsted will begin inspecting former exempt schools and colleges once routine Ofsted inspections resume. Ofsted has consequently been given additional time to undertake its initial inspections of these schools and has agreed to adopt a similar approach to colleges as a matter of policy.

7.11 In the case of schools and colleges that are not exempt from routine inspections, Ofsted has two main approaches to inspection: for schools – section 5 and section 8 inspections and for colleges 'full' and 'short' inspections.

7.12 Some schools (for example schools that require improvement) receive section 5 inspections, which are 'full' inspections, leading to graded judgements. Others, specifically 'good' schools and 'outstanding' schools that are not exempt (for example 'outstanding' special schools) receive a 'lighter touch' section 8 inspection, which is designed to ascertain whether high performance is being maintained. Where

a section 8 inspection indicates that performance may have dropped or, in the case of good schools, improved, Ofsted will either convert the section 8 into a section 5 inspection or will conduct a follow-up section 5 inspection in the next year or so.

7.13 A mixed model proportionate approach to inspections will be also apply when Ofsted begins its inspections of former exempt schools. Those last inspected a long time ago (before September 2015) will receive a section 5 inspection initially, while those last inspected more recently (in the last 5 years) will normally receive an initial section 8 inspection. These initial inspections will take place before 1 August 2026.

7.14 If the initial inspection is a section 5 inspection or a section 8 inspection which confirms that the school's 'outstanding' performance is being maintained, subsequent inspections will revert to the standard 5 year window that applies to other schools. The subsequent inspection will normally be a section 8 inspection.

7.15 If an initial section 8 inspection is not able to confirm that 'outstanding' performance is being maintained, but the concern is not so immediate that the inspection is converted to a section 5 inspection straightaway, Ofsted will conduct a section 5 inspection within a year or so and in any case before 1 August 2027. Subsequent inspections will then revert to the standard 5 year window.

7.16 The mixed model approach will also apply to colleges. Those last routinely inspected before September 2015 will receive an initial 'full' inspection[16], while those last inspected more recently will normally receive an initial 'short' inspection. If an initial inspection confirms that 'outstanding' performance is being maintained, the next inspection will take place within the next 5 years. If an initial 'short' inspection[17] is not able to confirm that the college's outstanding performance has been maintained, the inspection will be extended to a full inspection within 15 working days.

7.17 Ofsted will prioritise initial inspections of formerly exempt schools and colleges that have gone the longest since their last inspection, starting with those that have not been inspected for a decade or longer. It will also aim to organise scheduling so that, as far as possible, schools and colleges that have been inspected during or after September 2015 receive an initial inspection within five or six years of their previous inspection.

7.18 In laying these regulations, the Department understands that it is breaking the convention of providing a full academic terms notice ahead of changes coming into force. The Department first announced its intention to make this change in September 2019 and launched a consultation on proposals in January 2020, so schools and colleges have had sufficient notice of the changes. Laying of the regulations has been delayed as a result of the coronavirus (COVID-19) pandemic. A further delay would mean a delay to schools, colleges, parents, students, employers and the public getting the up to date information they need on performance.

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.

[16] In a full inspection, inspectors grade the overall effectiveness, the types of provision and the other key judgement areas in accordance with the Further Education and Skills Inspection Handbook. Further Education & Skills Inspection Handbook.

[17] In a short inspection of an outstanding college inspectors determine whether the college has maintained its outstanding performance.

9. Consolidation

9.1 This instrument amends the Education (School Inspection) (England) Regulations 2005 (S.I. 2005/2038). There are no plans to consolidate the regulations.

10. Consultation outcome

10.1 The Department published an online consultation on 10 January 2020 which closed on 24 February 2020. It received 3,726 responses, which included responses from headteachers, teachers, governors, Academy trusts, CEO's, parents and sector representatives and professional bodies.

10.2 89.80% agreed with the removal of the outstanding exemption for schools and 89.32% agreed with the removal for colleges. In addition, 80.06% agreed with the proposed mixed model approach for re-introducing inspections for former exempt schools set out in the consultation, and 79.50% agreed with the proposed mixed model approach for reintroducing inspections for former exempt colleges.

10.3 A separate government response document has been published that sets out details of the responses received. Copies of this are obtainable at the following link https://www.gov.uk/government/consultations/ofsted-inspection-removal-of-the-outstanding-exemption.

11. Guidance

11.1 Ofsted policy for the inspection of schools is set out in its Schools Inspection Handbook[18] and Section 8 Handbook[19]. These, and any other relevant documents, will be updated as appropriate before the new arrangements are implemented.

11.2 Ofsted policy for the inspection of colleges and other organisations delivering publicly funded further education and training is set out in its Further Education and Skills Inspection Handbook.[20] This, and any other relevant documents, will be updated before the new arrangements are implemented.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is minimal as currently exempt schools and colleges are in any case subject to possible non-routine inspection, for example, where Ofsted has concerns that high performance has not been retained or where there are concerns about safeguarding; and the resumption of routine inspections for this group of schools and colleges brings them back into line with existing arrangements for other schools and colleges that are not currently exempt from routine inspection.

12.3 An Impact Assessment has not been prepared for this instrument because of the minimal impact the instrument will have on the public sector, businesses, charities or voluntary bodies. The instrument brings a small minority of state-funded schools and colleges that are currently exempt from routine inspections into line with the arrangements for other schools and colleges that are not currently exempt from routine inspection. In respect of colleges the regulations only impact on publicly funded activities as any privately funded activity is not inspected by Ofsted. The

[18] School Inspection Handbook.

[19] School Inspection Handbook - Section 8 Inspections.

[20] Further Education & Skills Inspection Handbook.

proposals have though been subject to public consultation and have received strong support.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The government will keep under review the operation of this legislation, including through regulation engagement with Ofsted.

15. Contact

15.1 Megan Tilby (Megan.Tilby@education.gov.uk) or Malcolm D'Souza (Malcolm.D'Souza@education.gov.uk) at the Department for Education can be contacted with any queries regarding the instrument.

15.2 Lesley Jones, Deputy Director for Intervention, Faith and Accountability, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister of State, Nick Gibb at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.