EXPLANATORY MEMORANDUM TO

THE FURTHER EDUCATION INSTITUTIONS AND 16 TO 19 ACADEMIES (SPECIFICATION AND DISPOSAL OF ARTICLES) REGULATIONS 2012

2012 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument specifies further items for which Further Education College principals and staff authorised by them, and Principals of Sixth Form Colleges and 16 to 19 Academies, and staff authorised by them, can search students aged under 18 without the student's consent. The items are: tobacco products, fireworks and pornographic images.

2.2 Provision is also made as to how these items may, or must be, disposed of.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Department draws the Committee's attention to the reasoning behind its use of the power in section 89(4) of the Further and Higher Education Act 1992 (FHEA) (the power to make provision for different cases, circumstances or areas) to specify that whether an item is a prohibited item depends on the age of the student possessing the item.

3.2 The power to search, whilst potentially rights enhancing human rights (in that it can lead to improved discipline and behaviour, so enhancing the right to education) may come into conflict with students' right to respect for their private and family life. Any interference with this right must be in accordance with the law, and in this case, must be justified by the fact that the prohibited items are potentially harmful. When balancing the potential harm against the potential interference with the right to privacy, the Department concluded that the potential interference was justified for students aged under 18, but not for those aged 18 or over.

3.3 Colleges, particularly Further Education Colleges, provide for students from a wide age range, in some cases from age 14 upwards. BIS shares DfE's view that tobacco, fireworks and pornography are disruptive to learning for younger students, and have no place in their learning environment. These items are also potentially harmful. Whilst tobacco products are harmful to both children and adults, the law reflects parliament's view that children require special protection from these products. That is why it is illegal to sell tobacco products to under 18s.

Similarly, the fact that pornography and fireworks are not thought suitable for children is reflected in the fact that it is illegal for anyone under the age of 18 to possess fireworks in a public place and for under 18s to buy pornography;

3.4 As students aged 18 and over may lawfully possess tobacco products, fireworks and pornography and, (with the exception of tobacco) they are not in themselves necessarily harmful, the Department's view is that to search an adult student for these items would not justify interfering with their right to private and family life. The regulations therefore provide that these items are not prohibited items in respect of adult students. This means that only students aged under 18 may be searched for these items. This is consistent with the age limit of 18 imposed on searches without consent for alcohol in the parent legislation: see section 85AA FHEA.

4. Legislative Context

4.1 The regulation making power in section 85AA of the Act recognised that it was not possible to predict what colleges may need to search for in the future and was therefore introduced to enable additional items to be added to the list of prohibited items should a justifiable need arise. This is the first use of the regulation making powers under section 85AA(3)(f) and 85AC(7) of the Act[1].

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 The Secretary of State for Business, Innovation and Skills has made the following statement regarding Human Rights: In my view the provisions of the Further Education Institutions and 16 to 19 Academies (Specification and Disposal of Articles) (England) Regulations 2012 are compatible with the Convention rights.

7. Policy background

- **What is being done and why**

7.1 Regulation 3 lists the prohibited articles. Regulation 4 makes provision for their disposal as follows: college staff may keep or dispose of tobacco and fireworks; pornography may be disposed of unless its possession constitutes a specified offence, in which case it must be handed to the police as soon as reasonably practicable.

7.2 The policy objective of the regulation making power was to enable additional items to be added to list of prohibited items if a justifiable need arose and these Regulations fulfil that objective.

[1] Sections 85AA and 85AC were inserted by section 244(1) of the Apprenticeships, Skills, Children and Learning Act 2009.

7.3 The Government has made it a priority to improve standards of behaviour and discipline in schools - the coalition agreement includes a commitment to "give heads and teachers the powers they need to ensure discipline in the classroom and promote good behaviour". In order to maintain parity of treatment for students under the age of 18, regardless of the type of educational institution they attend, BIS and DfE, with regard to Sixth Form Colleges and 16 to 19 Academies, mirrors DfE's behaviour and discipline policies for schools in colleges as far as is practicable.

7.4 In addition to these Regulations, the Education Act 2011 has extended the range of items which may be searched for without a student's consent to include any article which has been, or could be, used to commit an offence or to cause personal injury or damage to property. It is intended to commence these extended powers on 1 April 2012.

7.5 The Department wishes to ensure parity of treatment with their peers in other educational institutions for college students under the age of 18 and is therefore mirroring the Department of Education's policy for schools in adding to the list of prohibited items for which students can be searched for without consent.

7.6 The new items added to these regulations should not be in the possession of students under 18. Allowing them to be searched for regardless of whether they had been used or were intended to be used to cause harm or commit an offence puts colleges' power to search for these particular items beyond argument.

8. Consultation outcome

8.1 An informal consultation on behaviour and disciplinary matters in the Further Education and Sixth Form College sector was held in September 2010. A workshop held as a result of the consultation discussed searching without consent for tobacco products, fireworks and pornography. The general consensus was that an age limit of 18 would be desirable.

8.2 The Association of Colleges, in a response to the informal consultation (*Proposal to extend the powers to search students in the further education sector: A response from the Association of Colleges*, AoC, Sept 2010) recognised the need for equality with schools in respect of the new prohibited items, but did not believe they were relevant to adult students.

9. Guidance

9.1 As these Regulations enable additional items to be searched for without a student's consent, and set out how items found as a result of a search must be disposed of, BIS will provide guidance for college principals and staff. This guidance will also cover the search powers in the Education Act 2011 and will be available before the regulations come into force. DfE will provide similar guidance for Sixth Form Colleges and 16-19 Academies.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies

10.2 The impact on the public sector is to add additional prohibited items to those for which students aged under 18 in colleges can be searched without their consent. This is a power not a duty and college staff cannot be compelled to use it.

10.3 An Impact Assessment has not been prepared for this instrument because there is no consequent impact on the public, private or civil society sectors, and none of the thresholds set out in the Impact Assessment guidance have been breached.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 There are no plans to review the operation of these powers formally. BIS and DfE will, however, remain alert to any feedback from practitioners, parents or others with an interest in this area, either through correspondence to the appropriate Department or through the Association of Colleges and Sixth Form College Forum. Both Departments will consider and respond to any information received.

13. Contact

13.1 Caroline Lucas at the Department for Business, Innovation and Skills (tel: 0114 207 5173 or e-mail: caroline.lucas@bis.gsi.gov.uk) can answer any queries regarding the instrument in respect of Further Education Colleges. Liam Flynn at the Department for Education (tel: 0114 274 2485 or e-mail: liam.flynn@education.gsi.gov.uk) can answer any queries regarding the instrument in respect of Sixth Form Colleges and 16-19 Academies.