EXPLANATORY MEMORANDUM TO

THE SCHOOL GOVERNANCE (CONSTITUTION) (ENGLAND) REGULATIONS 2012

2012 No. 1034

AND

THE SCHOOL GOVERNANCE (FEDERATIONS) (ENGLAND) REGULATIONS 2012

2012 No. 1035

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 These two sets of Regulations respectively make provision for the constitution of governing bodies of maintained schools and federated governing bodies in England that are established, decide to change their instrument of government, or federate, on or after 1 September 2012.

2.2 For the governing bodies of maintained schools established before 1 September 2012 the School Governance (Constitution) (England) Regulations 2007 ("the 2007 Constitution Regulations") and the School Governance (Federations) (England) Regulations 2007 ("the 2007 Federations Regulations") will continue to apply and no change to the constitution of such governing bodies will be required unless they decide to vary their instrument of government.

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

3.1 None

4. Legislative Background

4.1 The School Governance (Constitution) (England) Regulations 2012 ("the 2012 Constitution Regulations") are made under section 19 of the Education Act 2002 as amended by section 38 of the Education Act 2011.

4.2 During the passage of the Education Bill through Parliament the Government said that governing bodies of existing schools will not be required to change their constitution after the new Regulations come into force. Accordingly the 2007 Constitution Regulations continue to apply to a governing body constituted under an instrument of

government that takes effect before 1 September 2012 until they decide to vary their instrument of government.

4.3 Federation is a shared governance structure whereby two or more maintained schools come together under a single governing body under the provisions of section 24 of the Education Act 2002. The composition of a federated governing body follows the principles applying to single governing bodies set out in section 19 of the Education Act 2002 and in the 2007 Constitution Regulations. These principles for federations are set out in the 2007 Federations Regulations which continue to apply to a federated governing body constituted under an instrument of government that takes effect before 1 September 2012 until the instrument of government is varied after that date.

4.4 The School Governance (Federations) (England) Regulations 2012 ("the 2012 Federations Regulations") reflect the amendments made to section 19 and the 2012 Constitution Regulations which are being made at the same time as these Regulations.

4.5 The 2012 Federations Regulations also set out the procedures for discontinuance of federated schools and for dissolution of the federation where appropriate, reflecting changes made by section 39 of the Education Act 2011 which prevents dissolution from happening in circumstances where two or more schools will remain in the federation after the school concerned has discontinued. This will enable a school to close or convert to an Academy, without having to first undertake a statutory procedure to leave the federation in order to avoid dissolving the federated governing body.

4.6 The 2012 Federations Regulations also make provision for the application for an Academy order in respect of a federated school, further to section 57 of the Education Act 2011 which amends the Academies Act 2010 to enable a federated school to apply for an Academy order without requiring the agreement of the whole federated governing body. They also make provision regarding the transfer of school surpluses after a maintained school converts to Academy status, and for the determination of the amount of any school surplus that should be attributed to a federated school converting to Academy status.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

7.1 The 2007 Constitution Regulations and the 2007 Federations Regulations set out the individual constitutional models for the various categories of maintained schools (community, community special, foundation, foundation special, voluntary controlled, voluntary aided and maintained nursery schools), the various categories of federated schools and the proportions of governors from the various categories (parent, staff, authority, community, foundation, partnership and sponsor) that are applicable for each

category of school.

7.2 The 2012 Constitution Regulations and the 2012 Federations Regulations implement the Government's policy to allow governing bodies to be smaller and to recruit governors on the basis of skills needed to conduct the governing body's business effectively. So they provide that the minimum size of a governing body or a federated governing body shall be seven members, rather than nine as at present, and set out the categories of governor of which all maintained school governing bodies and federated governing bodies must comprise including such number of co-opted governors as the governing body considers necessary. It is intended that these governors will be recruited principally on the basis of their skills.

7.3 The Federations Regulations 2012 also provide that on the dissolution of a federation on discontinuance of federated schools where one school is not to be discontinued, a temporary governing body for the continuing school shall be created and also make provision for the transfer of land and reporting requirements to the Secretary of State.

7.4 On the discontinuance of federated schools where more than one school will remain in the federation, the Regulations provide for the federation's instrument of government to be reviewed before the date of discontinuance and arrangements for the transfer of land and property held by the federated governing body.

7.5 The Regulations provide that an application for an Academy Order in respect of a federated school can be made by a proportion of the governors, reflecting the total number of schools in the federated governing body. That proportion must be no fewer than 3 governors and must include including specified governors from the relevant federated school,

Consolidation

7.6 These Regulations do not amend another instrument.

8. Consultation Outcome

8.1 The draft Regulations were subject to a targeted consultation with members of the Department for Education's Advisory Group on Governance from 14 February 2012 to 12 March 2012 only, rather than being subject to a full 12 week public consultation, as the principles of the changes being introduced in these Regulations were fully debated in Parliament during the passage of the Education Act 2011. 19 responses to the consultation were received from local authorities, the Churches, the Association of School and College Leaders and governor members of the National Governors' Association.

8.2 Eight respondents, all local authorities, did not support the change whereby the appointment of authority governors would be made by the governing body, rather than the local authority. The Department has made no change in light of this opinion. It considers that the nomination of authority governors by the authority and their appointment by the governing body on an assessment of the skills specified by the governing body is consistent with the policy of appointments being made on the basis of

skills as set out in the debates in Parliament.

8.3 Several of these respondents also felt that the ability of the governing body to reject a nomination from an authority was inconsistent with the position regarding the appointment of a foundation governor where the governing body had no right to reject an appointment. The Department considers that foundation governors have a specific role to preserve and develop the character of the school, including any particular religious character, or where the school is a foundation school, to ensure that it is conducted in accordance with either its foundation's governing documents or trust deed. It would not be appropriate for the governing body to be able to reject such an appointment.

8.4 Seven respondents were concerned that the minimum size of a governing body was too small. The Department considers that some governing bodies may only need seven members, but all are free to choose their own size and can have more than seven members where needed. Two respondents considered that a maximum size for a governing body should be set. The Department considers that this is not necessary. One respondent strongly supported the reduction in the minimum size of the governing body.

8.5 Four respondents called for governing bodies to be able to remove elected staff and parent governors. The Department does not consider this appropriate as such governors have been elected to these posts. Two respondents called for surplus governors to be allowed to serve out their term of office rather than be removed immediately. The Department considers that this runs counter to the policy of allowing governing bodies to reduce in size and by allowing surplus governors to serve out their term of office, reductions may not be possible for up to four years.

8.6 One respondent called for the removal of the requirement that co-opted governors who are removed from office by the governing body should have that removal confirmed at a second meeting of the governing body not less that 14 days after the first meeting. The Department considers that this cooling off period should remain.

8.7 The draft 2012 Federations Regulations received comment from the Church of England Board of Education, who reported that they had no concerns with the draft regulations, and the Catholic Education Service for England and Wales (CESEW). CESEW expressed concerns that local authorities are allowed to determine that the federation is to be treated as a single school and each federated school will not have the right to their own delegated budget. This was the subject of further discussion between the Department and the Catholic Education Service for England and Wales. The Department has made no change in the light of this opinion.

9. Guidance

9.1 An explanation of the legislation will appear on the Department's website and the Governors' Guide to the Law will be amended to reflect the legislation.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument since it will not impose any significant cost or increase in workload to schools or local authorities.

11. Regulating small business

11.1 This legislation does not apply to small business.

12. Monitoring & review

12.1 We will monitor the operation of these regulations through regular meetings with the relevant representative bodies: the National Governors' Association, the National Co-ordinators of Governor Services, and through the termly discussions with the Advisory Group on Governance

13. Contact

13.1 Geoffrey Friston at the Department of Education Tel: 01325 735571 or e-mail: geoff.friston@Education.gsi.gov.uk can answer any queries regarding the instrument.