

EXPLANATORY MEMORANDUM TO

THE HIGHER EDUCATION (INVESTIGATION FEES) (ENGLAND) REGULATIONS 2022

2022 No. 1191

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument makes provision under the Higher Education and Research Act 2017 (“HERA”) for a fee to be payable to the Office for Students (“OfS”) by the governing body of a registered higher education provider where the OfS has investigated the activities of that provider and the investigation results in one or more specified outcomes.
- 2.2 This instrument is intended to enable the OfS to fund a new quality investigations regime, in line with strategic guidance issued by the Secretary of State for Education.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This is the first use of the enabling power conferred by section 71 of HERA. Section 71 provides that the OfS may, in accordance with regulations made by the Secretary of State, charge a fee for any activity undertaken by the OfS in the performance of its functions which is specified in the regulations.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The OfS was created by HERA and is the regulator of English higher education providers. Functions include the creation and maintenance of a register of higher education providers (section 3), the determining and publishing of initial and ongoing registration conditions (section 5), setting specific ongoing registration conditions (section 6) and the assessment of quality and standards (section 23).

- 6.2 In order to be registered, a higher education provider must meet its initial and ongoing registration conditions and continue to meet them in order to stay on the register. The OfS must ensure that the initial and ongoing registration conditions are proportionate to the OfS' assessment of the regulatory risk posed by the provider. The OfS monitors providers' regulatory risk on a continuous basis and may impose specific conditions of registration (section 6). If a provider is found to be in breach of a condition a sanction may be imposed under section 15 (monetary penalty), section 16 (suspending a provider's registration) or section 18 (removing a provider from the register). Section 2(1) sets out a list of matters to which the OfS must have regard when performing its functions.
- 6.3 Section 75 of HERA requires the OfS, from time to time, to prepare and publish a regulatory framework. The regulatory framework sets out how the OfS intends to perform its functions and provides guidance for registered higher education providers on the general ongoing registration conditions.¹
- 6.4 Section 13 of HERA provides that the initial and ongoing registration conditions may in particular include a condition relating to the quality of, and the standards applied to, the higher education provided by a provider, including requiring the quality to be of a particular level or particular standards to be applied. Section 23 of HERA sets out that the OfS may assess (or make arrangements for the assessment of) the quality of, and the standards applied to, higher education provided by English higher education providers (section 23(1)). It also sets out that the OfS must assess (or make arrangements for the assessment of) the quality of, and the standards applied to, higher education provided by higher education providers who have applied to be registered (to determine whether they satisfy initial registration conditions applicable to them) and who are registered (to determine whether they satisfy ongoing registration conditions applicable to them) (section 23(2)).
- 6.5 These Regulations are the first made under section 71 of HERA. The instrument makes provision about an activity for which the OfS may charge a fee, together with certain other related matters.

7. Policy background

What is being done and why?

- 7.1 This instrument provides for a fee to be payable to the OfS for an investigation of the activities of a registered higher education provider where the investigation results in any of the outcomes specified in regulation 2(1) as follows: the OfS (a) finds that there is or has been a breach of any ongoing registration condition of the provider; (b) imposes a specific ongoing registration condition on the provider's registration; (c) requires the provider's governing body to provide information pursuant to an ongoing registration condition of the provider referred to in section 8(1)(b) of HERA; or (d) makes a recommendation that, in order to mitigate what the OfS considers to be the increased risk of a breach of an ongoing registration condition of the provider, the provider should take or refrain from taking any action specified by the OfS.
- 7.2 The intention is to support the funding of a quality investigations regime to be operated by the OfS. Such investigations will be provider-specific, driven by data and

¹ [OfS 2018.01 Securing student success: Regulatory framework for higher education in England \(officeforstudents.org.uk\)](https://www.officeforstudents.org.uk)

intelligence, and separate from the routine and core regulatory activity that most providers are subject to.

- 7.3 Since the OfS was established, it has fulfilled its duties as set out in section 23 of HERA by determining whether higher education providers satisfy the registration conditions that relate to the quality of higher education provided by registered providers. These conditions are set out in the OfS' regulatory framework.
- 7.4 The OfS has recently consulted in three phases on how it should revise these registration conditions and how it should take action when these are not satisfied. Ministers have set a clear expectation that, now the new quality and standards registration conditions are in place, the OfS must quickly transition to being a more visible and effective regulator that can deal with quality issues as and when they arise.
- 7.5 This instrument will enable the OfS to fund a new, visible programme of quality investigations that is currently being set up.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.6 Section 70 of HERA sets out that the OfS may, in accordance with regulations made by the Secretary of State, charge a fee to a provider for (a) its initial registration in the register and (b) its ongoing registration in the register for each period of twelve months. Regulations have been made under this section: the Higher Education (Registration Fees) (England) Regulations 2019². The registration fees in this instrument are charged to all providers, and set in relation to the size of a provider. In practice, registration fee income is used to fund the majority of the OfS's operating costs and standard regulatory and monitoring activity. Regulations made under section 70 were previously sufficient to cover all activity. However, ministers have been clear in recent strategic guidance to the OfS that they would like to see new investigations activity taking place in order to fulfil a manifesto commitment to tackle low quality courses.
- 7.7 Section 71 of HERA provides that the OfS may, in accordance with regulations made by the Secretary of State, charge a fee for any activity undertaken by the OfS in the performance of its functions which is specified in the regulations. Prior to the making of this instrument, this enabling power had not been used.
- 7.8 This instrument will enable a proportionate approach to funding risk-based investigation activity which is primarily focused on providers considered to be at risk of breaching, or having breached, a condition of registration. These regulations are distinct from those made under section 70 in that they provide for a separate fee to be paid by an individual provider for an investigation that results in any of the outcomes specified in regulation 2(1)(a) to (d).
- 7.9 The principle that the bodies being regulated should fund the cost of their regulation is a government policy and will bring the OfS into line with other regulatory regimes. It follows good practice as set out in HM Treasury's Managing Public Money guidance.³

² [The Higher Education \(Registration Fees\) \(England\) Regulations 2019/453 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukdsi/2019/01/453) Amended by the Higher Education (Registration Fees) (England) (Amendment) Regulations 2021/304

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1075007/MP

- 7.10 The activity for which a fee is payable is set out in regulation 2 of the instrument. A fee is payable where an investigation by the OfS of the activities of a registered higher education provider has resulted in any of the outcomes specified in regulation 2(1)(a) to (d).
- 7.11 The fee payable is a sum, determined by the OfS, which is equal to the total amount of all the costs reasonably incurred by the OfS in conducting the investigation. However, the fee is only payable if the OfS decides not to impose any sanctions on the provider under sections 15 (monetary penalty), 16 (suspending a provider's registration) or 18 (removing a provider from the register) of HERA (including where this is because it considers there are no grounds to impose a sanction). Section 73 of HERA provides for the recovery of the OfS's costs when it imposes a sanction, and allows for the recovery of investigation and other costs in those circumstances.
- 7.12 The instrument provides for a process whereby providers to whom fees have been charged may make representations about the fee to the OfS. The OfS must have regard to the representations and either confirm, vary or withdraw the fee notice. This is consistent with the approach taken in the Higher Education (Registration Fees) (England) Regulations 2019. The instrument also provides a power for the OfS to waive or refund the fee.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 Not applicable; this is the first instrument made under the enabling power in section 71 of HERA.

10. Consultation outcome

- 10.1 No formal consultation was undertaken regarding this instrument.

11. Guidance

- 11.1 The OfS provides extensive guidance in its regulatory framework on the conditions of registration providers must meet in order to remain registered, as well as the enforcement action that may be taken if a provider is found to be in breach of, or at risk of breaching, a condition of registration. This includes information about ongoing condition of registration G3, which requires a registered provider to pay fees in accordance with regulations made by the Secretary of State.⁴
- 11.2 The instrument requires the OfS to publish a statement about its approach to determining the amount of the fee.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.

[M_Spring_21_with_annexes_040322_1.pdf](#) Other regulators where the cost of regulation is at least partly borne by the bodies regulated include Ofsted, Ofcom, and Ofgem.

⁴ [OfS 2018.01 Securing student success: Regulatory framework for higher education in England \(officeforstudents.org.uk\)](#)

- 12.3 A full impact assessment has not been produced for these Regulations because no, or no significant, impact on the private, voluntary, or public sector is foreseen.
- 12.4 The Department has self-assessed this measure through its internal triage process, because it is below the +/-£5m equivalent annual net direct cost to business threshold.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses, the Secretary of State has asked the OfS to focus investigation activity for which a fee can be charged on large providers with university title.

14. Monitoring & review

- 14.1 As with all OfS fees, this instrument will be kept under review and revisited if/when necessary.
- 14.2 The instrument does not include a statutory review clause because the relevant requirements of the Small Business, Enterprise and Employment Act 2015 do not apply to provisions imposing fees.

15. Contact

- 15.1 Rebecca Martin at the Department for Education (rebecca.martin@education.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Emma Davies, Deputy Director for Higher Education Quality, Regulation and International at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Robert Halfon MP, Minister of State at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.